Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

EAST DAYTON TOOL AND DIE COMPANY, *et al.*,
Petitioners,

v.

PENSION BENEFIT GUARANTY CORP.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

CHARLES J. FARUKI *
PAUL L. HORSTMAN
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
(513) 227-3705
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the 80% stock ownership regulation of the Pension Benefit Guaranty Corporation for determining trades or business under common control for the purposes of assessing liability for underfunded pension benefits of terminated pension plans for the purposes of Title IV of the Employee Retirement Income Security Act ("ERISA") applied where (a) the stock of the corporate plan sponsor was held by an escrow agent to secure payment of a promissory note representing the balance owed by the corporate plan sponsor for redemption of stock and (b) prior to the date of plan termination, as a result of a default under the escrow agreement, the rights of stock ownership reverted to the secured payee who exercised those rights to take control of the plan sponsor and divest Appellees from all measure of control and ownership over both the pension plan and the operations of the plan sponsor?

2. Whether the Court of Appeals for the Sixth Circuit erred in applying the 80% ownership regulation to impose liability on Appellees for underfunded pension benefit liabilities on the basis of Appellees' ownership and control over the plan sponsor for a 2½-year period prior to the date of plan termination, regardless of Appellees' lack of ownership and control over the plan sponsor on the date of pension plan termination?

THE PARTIES

Petitioners are East Dayton Tool & Die Company ("East Dayton"), the pension plan sponsor, Roscommon Financial Corporation ("Roscommon Financial"), Dayton Casting Company, Inc. ("Dayton Casting"),* Advance Foundry Company, Inc. ("Advance") and Roscommon Realty Company ("Roscommon Realty"), a real estate partnership, and the individual partners of Roscommon Realty, Paul H. Granzow ("Granzow"), Charles F. Sherman ("Sherman") and Robert M. Tormey ("Tormey"). The Respondent is the Pension Benefit Guaranty Corporation.

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* Dayton Casting owns as a subsidiary Richman Casting Company, which is not a party to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Magistrate Judge issued two memoranda and recommendations granting the motion for judgment on the pleadings of East Dayton, Roscommon Financial, Dayton Casting, Advance Foundry and Roscommon Realty and the motion to dismiss of Petitioners Granzow, Sherman and Tormey. The decisions of the Magistrate Judge are, for the convenience of the Court, set forth in the Appendix at 12a-30a and 44a-47a. Also, the district court's Memorandum and Order adopting the Magistrate's recommendation is at 31a-43a of the Appendix.

The Opinion of the United States Court of Appeals for the Sixth Circuit, entered on January 24, 1994 ("Opinion"), is at 1a-11a of the Appendix. On appeal the deci-

sion of the district court was reversed and the case was remanded for further proceedings.

JURISDICTIONAL STATEMENT

The judgment in the United States Court of Appeals for the Sixth Circuit was entered on January 24, 1994. Petitioners East Dayton, Roscommon Financial, Dayton Casting, Advance Foundry, Roscommon Realty, Granzow, Sherman and Tormey timely filed a Motion for Rehearing and Suggestion of Rehearing En Banc. On March 9, 1994, the Petitioners' motion for rehearing was denied and the mandate was issued by the Court of Appeals for the Sixth Circuit. Appendix at 48a. The Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 29 U.S.C. § 1368(d).

STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of several provisions of ERISA, 29 U.S.C. §§ 1301-1382 (1976), relating to the pension plan termination insurance program administered by the Pension Benefit Guaranty Corporation ("PBGC"). The sections at issue, §§ 1301(b) and 1362 of Title 29 U.S.C., are set forth at 49a-55a of the Appendix.[1]

STATEMENT OF THE CASE

A. Introduction

This lawsuit was commenced by the Pension Benefit Guaranty Corporation ("PBGC") to collect an alleged liability for pension plan underfunding of the East Dayton

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[1] ERISA was amended by the Single-Employer Pension Plan Amendments Act of 1986, Pub. L. No. 99-272, Title XI, 100 Stat. 237 (1986) ("SEPPAA") and again by the Pension Protection Act of 1987, Pub. L. No. 100-206, Title IX, subtitle (D), Part II, 101 Stat. 1330-33 (1987) ("PPA"). Neither SEPPAA nor PPA apply to the instant case. Therefore, unless otherwise stated, the citations in the petition are to 29 U.S.C. §§ 1301-1382 (1976).

pension plan on the basis that the Appellees—which include brother/sister entities and individual owners of those entities—were members of a "controlled group" that made them employers who maintained an underfunded pension plan covered by the pension plan termination insurance program established by Title IV of ERISA and administered by the PBGC.

Petitioner East Dayton was the plan sponsor. Petitioners Roscommon Financial, Roscommon Realty, Advance Foundry and Dayton Casting are claimed to be members of the "controlled group" as a result of Roscommon Financial's alleged ownership of 100% of the stock of East Dayton. The Individual Petitioners Granzow, Sherman and Tormey are partners of Petitioner Roscommon Realty, a general partnership, who are claimed to be liable for the obligations of the partnership. All the stock of East Dayton had been placed in escrow and pledged to secure a $1,200,000 debt owed by East Dayton to Dorothy Darrow ("Darrow") for the redemption of all the shares of East Dayton owned by Darrow.

The Magistrate, relying on the reasoning of *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983) (*"Challenge Stamping"*), recognized that once East Dayton defaulted, the loan documents effectively transferred control to the secured creditor, Dorothy Darrow, prior to the termination date, so that the Roscommon Group [2] was not an employer controlling East Dayton on the plan's termination date and therefore was not liable for East Dayton's underfunded benefit liabilities. The district court adopted the Magistrate's recommendation and entered judgment for the Petitioners.

The Court of Appeals for the Sixth Circuit reversed and remanded, reasoning that *Challenge Stamping* did not

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[2] Roscommon Financial, Roscommon Realty, East Dayton, Dayton Casting, Advance Foundry and Individual Petitioners are collectively referred to as Roscommon Group.

control because Roscommon Financial actually controlled East Dayton and its plan for 2½ years prior to the January 26, 1976 default by Roscommon Financial on Darrow's loan, regardless of Appellees' lack of ownership and control over the pension plan on the May 15, 1976 plan termination date. Appendix at 3a and 8a-9a. Because *Appellees lacked all indicia of ownership and control over the plan sponsor on the* May 15, 1976, *plan termination date,* Appellees assert that they cannot be liable under 29 U.S.C. § 1362 because liability is predictated upon ownership and control at the time the plan was terminated, not upon ownership and control during a period of time prior to the termination date.

The Administrative Record before the PBGC appeals board showed the following undisputed facts: East Dayton is an Ohio corporation formed September 21, 1928. R. 17; A.R. 1020.[3] East Dayton was engaged in the manufacture, design and sale of tools and dies for the industry. Mrs. Dorothy Darrow ("Darrow"), the daughter of the founder William Schulman, eventually inherited all of the stock in East Dayton and held 100% of the stock until the initial sale of the stock on August 23, 1973. R. 17; A.R. 1020.

East Dayton had established a qualified retirement plan for its salaried employees on January 1, 1959. The East Dayton Tool & Die Company retirement plan for salaried employees ("East Dayton Plan" or "Plan") was funded through a trust with the Third National Bank & Trust Company of Dayton, Ohio ("Third National").

On August 23, 1973, Darrow sold common shares of East Dayton to Granzow, Sherman, Tormey and Clifton C. Hawkins, Jr. ("Hawkins") for an aggregate sum of $150,000. Granzow, Sherman and Tormey each held

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[3] Citations to the District Court's Docket and the Administrative Record will be cited first to the Court's Docket ("R. ——") and then to the Administrative Record ("A.R. ——").

8.42 shares and Hawkins held 2.08 shares. R. 17; A.R. 829.

On August 28, 1973, East Dayton redeemed the balance of Darrow's East Dayton stock consisting of 238.6 common shares and 748 preferred shares for $1,350,000. Darrow received $150,000 cash at the closing and the remaining $1,200,000 under a promissory note from East Dayton. R. 17; A.R. 1082. At the closing of the sale, the parties executed an agreement for sale of all the stock of Dorothy Darrow ("Redemption Agreement"), a $1,200,000 promissory note and an escrow agreement. R. 17; A.R. 1025, 1031. As a result of the transaction, Granzow, Sherman, Tormey and Hawkins became the record shareholders of East Dayton. R. 17; A.R. 830.

Under the terms of the note, the principal amount was secured by, among other things, the pledge of all the common stock of East Dayton, including the common stock held by Granzow, Sherman, Tormey and Hawkins. R. 17; A.R. 1086. The shares were pledged to Darrow and escrowed with the escrow agent, Third National, which held the stock certificates together with an assignment, separate from the certificates, evidencing the ownership of the shares executed in blank by the individual shareholders. R. 17; A.R. 1026. The Escrow Agreement provided:

> "2. So long as Company [East Dayton] shall well and truly pay the promissory note according to its terms and tenor, the said stock certificates shall be held by the Escrow Agent, and Shareholders shall continue to have all the rights of ownership, except possession and transfer rights. At such time as the said promissory note has been fully paid, the executed assignment form and related certificates shall be redelivered to Shareholders and this Escrow Agreement shall be void and of no further force and effect.
>
> "3. Upon written notice given to Escrow Agent by Darrow of a default in the payment of any install-

> ment of interest or principal due according to the terms of said promissory note, then Escrow Agent shall either (i) cause the shares to be sold as hereinafter set forth, or (ii) shall cause the immediate election to the Board of Directors of the Company, of not less than two persons chosen by Darrow or her executors or assigns; said directors to continue in office until the Company cures the default, or, in the event the default cannot be cured in the opinion of the two directors, then Escrow Agent shall [sell the stock] . . . ."

R. 17; A.R. 1088-89.

Roscommon Financial was incorporated on March 22, 1973, with Granzow, Sherman and Tormey each owning 33⅓ percent of the stock. They were elected directors on January 22, 1974. R. 17; A.R. 830.

Granzow, Sherman and Tormey each owned 33⅓ percent of Roscommon Realty, a real estate partnership. On February 8, 1974, Granzow, Sherman and Tormey transferred their East Dayton common stock to Roscommon Financial. R. 17; A.R. 870. Shortly thereafter, Roscommon Financial acquired Hawkins' stock and became East Dayton's sole shareholder.

Between August, 1973, and December, 1975, East Dayton's business continued to decline. Attempts to secure additional financing were futile. R. 17; A.R. 1030. Finally, on January 26, 1976, Roscommon Financial defaulted on Darrow's loan. R. 17; A.R. 1031. Darrow refused to consent to a loan which would have allowed Roscommon Financial to continue in business, and instead, pursuant to the options provided in the loan documents, at a February 6, 1976 meeting, appointed two directors to East Dayton's board. R. 17; A.R. 1030-32. On February 7, 1976, the newly elected East Dayton board (under Darrow's control) decided to liquidate East Dayton and to repay Darrow with the proceeds. The Individual Appellees did not approve of or participate in

the decision to liquidate. R. 17; A.R. 1034. At that time since Darrow had beneficial ownership of the stock, Granzow offered to effect the formal transfer of East Dayton's shares from the Escrow Agent to Darrow, but Mrs. Darrow refused to accept the stock. R. 17; A.R. 1034.

The Court of Appeals' opinion erroneously states that the parties agreed that on the plan termination date, May 15, 1976, Roscommon owned 100% of East Dayton stock. Appendix at 3a-4a. On the contrary, Roscommon Financial asserted before the PBGC's appeals board that (a) it lost all indicia of ownership in East Dayton stock as a result of the February 6, 1976, default, (b) the effects of the default and the February 6, 1976, meeting electing directors selected by Darrow were that (1) the shareholders' ability to vote the stock and make decisions regarding management or liquidation were transferred from Roscommon Financial, Sherman, Tormey and Granzow to Darrow, (2) the shareholders' right to participate in the proceeds of the liquidation were subordinate to the interests of Third National and Darrow, (3) the shareholders' right to elect directors were relinquished to Darrow, (4) the default provisions of the escrow agreement were exercised by Darrow, (5) the beneficial interest in the stock was transferred to and exercised by Darrow, (6) Third National continued to hold the stock as Escrow Agent for the use and benefit of Darrow, (7) Roscommon Financial retained mere record title to the stock on the books and records of East Dayton for the use and benefit of Darrow. R. 17; A.R. 1035.

On or about March 31, 1976, East Dayton ceased all active plant operations. R. 17; A.R. 831. On April 25, 1976, East Dayton (controlled by Darrow) sent the PBGC a notice of intent to terminate the Plan. On May 3, 1976, a special meeting of the directors of East Dayton was held, at which meeting the directors (all subject to Mrs. Darrow's control) voted to terminate the Plan. R.

17; A.R. 1211. East Dayton's plan was officially terminated by the PBGC on May 15, 1976. R. 17; A.R. 1232.

The PBGC notified East Dayton its plan assets were insufficient by $326,362 to satisfy the benefits guaranteed by ERISA under Title IV. The PBGC determined that East Dayton, Roscommon Financial, Dayton Casting, Advance Foundry, Roscommon Realty and two other entities (they were found not liable by the PBGC) were members of the same control group as defined by 29 U.S.C. § 1301(b) and therefore were jointly liable for the amount of $326,362. R. 17; A.R. 811-13.

On May 6, 1981, the Roscommon Group appealed the PBGC's initial liability determination to the PBGC's Appeals Board. On appeal, the Roscommon Group argued that they were not a control group for liability purposes because Roscommon did not control East Dayton on the plan termination date and had lost all indicia of ownership prior to the plan termination date. The Roscommon Group noted that the loan documents upon default divested them of all authority and vested control in Darrow.

On April 28, 1982, the Appeals Board issued the agency's final determination, finding that Roscommon Group was a member of a commonly controlled group on the plan termination date under § 4001(b) of ERISA. As such, the PBGC found that the Roscommon Group qualified as an "employer" which maintained the Plan and was liable for the guaranteed benefits. Thus, the PBGC sought to impose liability on the Roscommon Group regardless of the fact that the Roscommon Group lost all indicia of ownership in East Dayton stock as a result of the default under the loan documents effective February 6, 1976, several months prior to the May 15, 1976 plan termination date.

B. Procedural History of the Case and Jurisdictional Statement

Respondent, on May 13, 1982, sought enforcement of the agency's determination in the United States District Court for the Southern District of Ohio. On June 22, 1982, the Roscommon Group filed an Answer, Counterclaim and Motion for Judgment on the Pleadings. Simultaneously, the Individual Petitioners filed a motion to dismiss the PBGC's complaint.

On January 23, 1985, the district court referred the case to the Magistrate. The Magistrate, relying on the reasoning of *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983) (*"Challenge Stamping"*), concluded that (a) once Roscommon Financial defaulted, the loan documents effectively transferred control to Darrow prior to the plan termination date and (b) the Roscommon Group was not the employer controlling East Dayton on the Plan's termination date, and, therefore, was not liable for East Dayton's underfunded pension benefit liabilities. The district court adopted the Magistrate's recommendation and entered judgment for the Appellees, stating in part:

> "The allegation that [*Challenge Stamping*] applies only in bankruptcy contexts is without merit. In [*Challenge Stamping*], the Sixth Circuit did not limit its pronouncement to bankruptcy scenarios. Rather, the [*Challenge Stamping*] court looked to the totality of the circumstances surrounding corporate operations and actual control over the owned company or over the pension plan to determine whether or not the 80% stock ownership rule accurately defined the party with a controlling interest. In this Court's opinion, the means by which corporate control is lost is not relevant. Regardless of the means that effectuate the loss of control, the same result is achieved—the loss of control over company operations and the pension plan. Thus, whether a com-

pany is stripped of its control by a bankruptcy court or by a secured creditor, as in this case, is insignificant; it is a distinction without a difference."

The Sixth Circuit Opinion is dated January 24, 1994. In that Opinion the Sixth Circuit disagreed with the District Court's conclusion that *Challenge Stamping* controls the instant case. The Sixth Circuit stated that in *Challenge Stamping* the stock purchaser never had actual control over the company involved or its pension plan, whereas, in contrast, Roscommon Financial actually controlled East Dayton as planned for 2½ years prior to the January 26, 1976, default on Darrow's loan. Appendix at 2a, 8a-9a. The Sixth Circuit reasoned that because the Roscommon Group controlled East Dayton and its Plan for over 2½ years, *Challenge Stamping*'s reasoning is not applicable and that the district court erred in not applying ERISA's 80% control test. Appendix at 8a-9a.

REASONS FOR GRANTING THE PETITION

The Roscommon Group would raise two arguments on appeal. The first issue is whether the 80% ownership regulation applies to the Roscommon Group where Roscommon Financial, the alleged owner of East Dayton stock, lost all indicia of ownership and control over the affairs of East Dayton *prior to the plan termination date* as a result of a default on the loan documents which passed ownership rights and control to the secured creditor Dorothy Darrow. The second issue is whether the Sixth Circuit erred by fixing responsibility for pension plan underfunding on the basis of Roscommon Financial's ownership and control of East Dayton for 2½ years prior to the January 26, 1976, default, regardless of Roscommon Financial's loss of ownership and control to Mrs. Darrow on February 6, 1976, several months prior to the plan termination date. Petitioners other than East Dayton were held liable regardless of the fact that they did not participate in the decisions made by Darrow after February 6, 1976 to liquidate East Dayton and to terminate the Plan.

Certiorari should be granted on these issues because the application of the 80% ownership regulation and the provisions of 29 U.S.C. § 1362, which imposes liability on any employer who maintained a plan (other than a multiemployer plan) "at the time it was terminated," present important federal questions of concern to all persons maintaining pension plans subject to the pension benefit guaranty program operated by the PBGC. Although this case involves the 1976 versions of §§ 1301(b) and 1362 of Title 29 U.S.C., the same definition of "controlled group" was retained by the 1986 amendment to § 1301. That definition is in the current version of § 1301(a)(14). Moreover, the requirement in the prior version of § 1362 that liability applies to employers who maintained a plan "at the time it was terminated" was retained in the current (1986) version of § 1362, which imposes liability on any person who is a member of a controlled group "on the [plan] termination date." Thus, the issues raised in the petition directly affect all persons maintaining or having an ownership interest in an entity maintaining a plan subject to the current (1986) version of §§ 1301 and 1362 of Title 29 U.S.C.

This Court should fashion a clear rule of law on whether liability for underfunding of a pension plan at the termination date for the plan can be predicated upon ownership of or control over a plan sponsor during a period prior to the plan termination date, where the parties sought to be held liable lacked all indicia of ownership and control over the plan and the plan sponsor on the date of plan termination. Moreover, this Court should fashion a clear rule whether, for the purposes of the application of the PBGC's 80% ownership regulation to determine members of the controlled group, ownership exists where all indicia of ownership is lost to a secured creditor prior to the plan termination date. As previously shown, these issues continue to be important federal questions under the current 1986 revisions to § 1301 and § 1362, 29 U.S.C.

Unless clear rules of law are stated by this Court, there will be continued uncertainty as to (a) whether ownership for purpose of determining members of a controlled group can be based on bare record title where stock voting rights and the value of the stock were transferred to a secured creditor who terminates the plan, and (b) whether liability for terminated single-employer plans can be based upon ownership and control prior to the plan termination date rather than ownership and control on the date of plan termination.

I. THE ROSCOMMON GROUP IS NOT LIABLE UNDER ERISA BECAUSE ROSCOMMON FINANCIAL LACKED ALL INDICIA OF OWNERSHIP AND CONTROL OVER THE PLAN SPONSOR, EAST DAYTON, ON THE DATE OF PLAN TERMINATION

For the purposes of defining trades or businesses under "common control" under 29 U.S.C. § 1301(b), the PBGC 80% ownership regulation defined "common control" as an ownership interest of 80% of the total combined voting classes or of the total value of all shares of all classes of stock connecting a group of trades or businesses. 26 C.F.R. §11.414(c)-(2)(f)(1). The regulation does not define "ownership". Moreover, the Court of Appeals for the Sixth Circuit in its opinion did not define ownership. Rather, the court (Appendix at 9a) erroneously stated that "[t]he parties agreed on the termination date Roscommon Financial owned: (1) 100% of East Dayton stock. . . . Additionally, because the ownership exceeds 80% of the total value of stock in each business, it qualified as 'controlling' interest under ERISA." Both the statement regarding the parties' alleged agreement on Roscommon's ownership of East Dayton and the statement regarding 80% ownership of the total value of East Dayton stock are erroneous.

The parties did not agree that on the termination date Roscommon Financial owned 100% of the stock of East Dayton. Rather, Petitioners contended before the PBGC,

and, after being denied an evidentiary hearing, submitted uncontroverted affidavits showing, that prior to the plan termination date (a) "beneficial ownership of [East Dayton] stock had been transferred to the previous owner [Darrow]," (b) "Appellants lost all of the voting power and indicia of ownership associated with the East Dayton stock," and (c) "the East Dayton stock was valueless." Joint Appendix, Vol. IV, 0769 at 0791; R. 933 at 955.[4] Moreover, the Magistrate found, upon review of the Administrative Record, that "[t]he breach of the Escrow Agreement resulted in a total loss of their [Petitioners'] ownership rights in the East Dayton stock." Joint Appendix Vol. I, 0234 at 0248 (July 5, 1985 Report and Recommendation). Thus the Court's statement that the parties agreed that Roscommon Financial owned 100% of East Dayton stock is factually incorrect. For this reason alone, the writ of certiorari should be granted to vacate the Sixth Circuit Opinion.

Moreover, the Administrative Record does not support the finding that Roscommon Financial had ownership of the East Dayton stock on the date of plan termination. After the default under the Escrow Agreement in February, 1976, all indicia of ownership passed to Dorothy Darrow. Ignoring the reality of the events in February, 1976, in which Darrow exercised voting rights over the stock held in escrow for her benefit to take control of the corporation, to terminate East Dayton's pension plan and to liquidate its assets, the PBGC impermissibly determined that Roscommon Financial was the owner of the stock. In fact, Roscommon Financial lacked all indicia of ownership in that it had (a) no right to vote the stock, (b) no right to transfer the stock and (c) no right to sell the stock.

In addition, the Opinion of the Court of Appeals erroneously stated that Roscommon Financial owned in ex-

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[4] This reference is to the Joint Appendix filed in the Court of Appeals for the Sixth Circuit.

cess of 80% of the value of East Dayton stock. Appendix at 9a. The uncontroverted evidence in the Administrative Record (recited in the Court of Appeals' Opinion, Appendix at 3a-5a) was that Darrow took voting control of East Dayton in February, 1976, and used that control to liquidate the company and to receive all the proceeds of the liquidation after payment to creditors. As a result, in February, 1976, 100% of the value of the East Dayton stock was transferred to Dorothy Darrow subject to the claims of creditors of East Dayton. Thus, Roscommon Financial did not possess 80% or more of the total value of the East Dayton stock at the time of the May 1976 plan termination.

Under the 80% ownership regulation, Roscommon Financial had to own either 80% of the voting stock or 80% of the total value of the East Dayton stock on the date of plan termination. 26 C.F.R. § 11.414(c)-(2)(b)(1). Neither condition was met in this case. The Court's opinion recognized that the first condition—80% ownership of voting stock—was not met. As stated in the Court's Opinion (Appendix at 3a), prior to the plan termination date "Darrow had control of the *voting rights* of the [East Dayton] stock." (Emphasis added). Moreover, since at the time of plan termination, 100% of the total value was owned by Darrow as a result of the February, 1976 default, Roscommon Financial did not have ownership over 80% of the total value of the stock on the date of plan termination. Thus, the second condition for controlling interest—ownership of 80% of the total value of the stock on the date of plan termination was also not met. Accordingly, since the Court of Appeals' opinion was based on the erroneous premise that Roscommon Financial owned over 80% of the "total value" of East Dayton stock on the date of plan termination, the petition for writ of certiorari should be granted.

II. THE SIXTH CIRCUIT ERRED IN APPLYING THE 80% OWNERSHIP REGULATION ON THE BASIS OF APPELLEES' OWNERSHIP AND CONTROL OVER THE PLAN SPONSOR FOR A PERIOD OF TIME PRIOR TO THE DATE OF PLAN TERMINATION REGARDLESS OF APPELLEES' LACK OF OWNERSHIP AND CONTROL OVER THE PLAN SPONSOR ON THE DATE OF PLAN TERMINATION

Section 1362 of Title 29 U.S.C. defining employer liability for underfunded pension plans provides that it "applies to any employer who maintains a single employer plan *at the time it was terminated. . . .*" [5] Thus the statute, in clear and unambiguous terms, requires that liability be imposed upon persons who are employers "on the termination date." Employers include persons who are members of the "controlled group", *i.e.*, persons who own 80% or more of the voting stock or the value of the stock of the plan sponsor. However, since liability is based upon the termination date of the plan, any person, like Roscommon Financial, which has lost its stock ownership in the plan sponsor prior to the plan termination date, cannot be held liable as an employer who maintained the plan on the plan termination date.

In *Challenge Stamping*, the Court of Appeals for the Sixth Circuit concluded that "stock did not provide *any* measure of control over [plan sponsor] *at the date of termination*, and thus the [80% ownership] regulation did not apply." 719 F.2d at 151 (second emphasis added). In its opinion, the Court of Appeals for the Sixth Circuit erroneously distinguished *Challenge Stamping* from this case on the impermissible basis that the stock purchaser

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[5] The current (1986) version of § 1362 defining employer liability retains the requirement that liability be determined as of the plan's termination date. The current § 1362 provides that "any person who is, *on the termination date*, is . . . a member of such a contributing sponsor's controlled group shall incur liability under this section." (Emphasis added.)

in *Challenge Stamping* never had actual control over the plan sponsor. Appendix at 8a. It found that the regulation applied because Roscommon Group controlled East Dayton and its plan for 2½ years prior to the January, 1976, default under the loan documents with Darrow. In basing liability of the Petitioners upon Roscommon Financial's past ownership of East Dayton stock regardless of its loss of ownership on the date of plan termination, the Sixth Circuit adopted a new rule for liability based on past ownership which directly contravenes the applicable law and regulation which makes ownership and control of the plan sponsor *on the date the plan terminated*, not ownership and control prior to the termination date the criterion for imposing liability for pension plan underfunding. No other court of appeals has so held.

Until the decision by the Court of Appeals for the Sixth Circuit in this case, the criterion for common control over the plan sponsor was ownership on the date of plan termination. Significantly, the PBGC in its decision recognized that the criterion was common control over the plan sponsor on the date of plan termination. Joint Appendix Vol. I at 0054; R. at 1229 (PBGC Appeals Board Decision, April 28, 1982). When ownership of the plan sponsor ends prior to the date of plan termination, no liability can be imposed upon a person as a member of a "controlled group" regardless of the person's past ownership and control over the plan sponsor during a period prior to the date of plan termination.

For example, in *PBGC v. Jeannette Newspapers, Inc.*, 585 F. Supp. 1281, 1283-84 (W.D. Pa. 1984), the court found that the plan termination date was the same date as the sale date and that the sale was conditioned on plan termination. Thus, reasoned the court, neither the seller nor the buyer could be held liable as members of the controlled group because they lacked ownership of the plan sponsor on the date of plan termination. Likewise, in February, 1976, over two months prior to the plan ter-

mination date, Roscommon Financial lost all indicia of ownership of East Dayton stock. The fact that Roscommon Financial may have controlled East Dayton prior to February, 1976, is not relevant since, under the applicable law and regulation, ownership for the purposes of applying the 80% ownership regulation must be determined on the date of plan termination. Since liability under § 4062 of ERISA is limited to any employer who maintained a plan on its termination date, ownership and control over East Dayton during a period prior to the date of plan termination is irrelevant. Since Roscommon Financial did not own 80% of the voting stock or 80% of the value of East Dayton stock on the date of plan termination, it and the other Petitioners (Roscommon Realty, Advance Foundry, Dayton Casting and Individual Petitioners) cannot be members of a controlled group for East Dayton and thus cannot be deemed employers who maintained the East Dayton plan on the date it terminated.

Since the Court of Appeals for the Sixth Circuit in this case applied a new test for determining common control based on control and ownership during the period prior to the date of plan termination and ignored the correct test of liability based upon ownership and control of the plan sponsor on the date of plan termination, the Court of Appeals' Opinion is erroneous as a matter of law and the petition for writ of certiorari for this separate and independent reason must be granted.

CONCLUSION

The petition for writ of certiorari should be granted on both issues. This case raises significant federal questions under Title IV of ERISA regarding the liability of persons having an alleged ownership interest in the sponsor of a terminated plan insured by the PBGC. The first issue is whether a mere identification on the stock registry without any of the rights of stock ownership constitutes

stock ownership. The answer is no because "paper" ownership carried with it none of the indicia of ownership. The second issue is whether membership in a controlled group can be based on stock ownership that ceased prior to the date of Plan termination. If the Court of Appeals' Opinion is allowed to stand, liability will be imposed upon persons who neither owned the plan sponsor on the date of plan termination nor participated or influenced the decision to terminate the plan. Since the 80% ownership regulation continues to apply to persons subject to the current (1986) version of the statute, the issues raised in this petition continue to directly affect persons who maintain or are affiliated with persons who maintain pension plans insured by the PBGC. Thus, a clear rule of law defining the extent to which liability, if any, on the basis of membership in a controlled group of a plan sponsor can be predicated upon past ownership of the plan sponsor, is important to the effective administration of Chapter IV of ERISA governing liability to the PBGC for underfunded pension plans. For all the reasons stated in this petition, East Dayton, Roscommon Financial, Roscommon Reality, Advance Foundry, Dayton Casting and Individual Petitioners request that this case be heard.

Respectfully submitted,

CHARLES J. FARUKI *
PAUL L. HORSTMAN
FARUKI GILLIAM & IRELAND
600 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, OH 45402
(513) 227-3705
Attorneys for Petitioners

* Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3185

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff-Appellant,

v.

EAST DAYTON TOOL AND DIE COMPANY, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed January 24, 1994

Before: KEITH and NORRIS, Circuit Judges; and ZATKOFF, District Judge.*

DAMON J. KEITH, Circuit Judge. Plaintiff/Appellant Pension Benefit Guaranty, Corp. ("PBGC") appeals the district court's judgment finding the Defendants/Appellees East Dayton Tool and Die Co., Inc. ("East Dayton"), et al., did not control East Dayton's pension plan on its termination date and therefore, were not liable for the pension plan's unfunded benefit liabilities, and its subsequent grant of individual Appellees' 12(b)(6) motion. For the reasons stated below, we REVERSE and REMAND.

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* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

I.

In 1959, East Dayton, an Ohio corporation that designed, manufactured and sold tools and dies, established the East Dayton Tool & Die Restated Retirement Plan for Salaried Employees (the "Plan") which qualified for coverage under Title IV of the Employee Retirement Income Security Act ("ERISA"). Dorothy Darrow ("Darrow"), the daughter of East Dayton's founder, eventually inherited 100% of East Dayton stock.

On August 23, 1973, Darrow sold East Dayton's common shares for $1.35 million to Paul H. Granzow ("Granzow"), Charles F. Sherman ("Sherman"), Robert M. Tormey ("Tormey"), individual Appellees, and Clifton C. Hawkins, Jr. ("Hawkins").[1] The individual Appellees each purchased 30% of the stock and Hawkins purchased the remaining 10%. In return for the stock, individual Appellees gave Darrow $150,000 in cash and a $1.2 million promissory note secured by the voting rights of East Dayton stock and the right to compel the sale of East Dayton stock upon default. The shares of stock, although pledged to Darrow, were held in escrow by Third National. The loan documents provided upon default, Darrow could either compel the sale the stock or elect at least two directors to East Dayton's Board of Directors.[2]

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[1] Hawkins was not sued in his individual capacity, and therefore he is not included in the collective reference to "individual Appellees."

[2] The Escrow Agreement in pertinent part provided:

> 2. So long as Company [East Dayton] shall well and truly pay the promissory note according to its terms and tenor, the said stock certificates shall be held by the Escrow Agent, and Shareholders shall continue to have all the rights of ownership, except possession and transfer rights.
>
> 3. Upon written notice given to Escrow Agent by Darrow of default in the payment of any installment of interest or principal due according to the terms of said promissory note, then

At the time of stock acquisition, each individual Appellee owned one-third of the holding company Roscommon Financial Corporation ("Roscommon Financial"). In February 1974, the individual Appellees transferred their East Dayton stock to Roscommon Financial. Shortly thereafter, Roscommon Financial acquired Hawkins' stock and became East Dayton's sole shareholder.

On January 26, 1976, after operating East Dayton for two and a half years, Roscommon Financial Defaulted on Darrow's loan. Darrow refused to consent to a loan which would have allowed Roscommon Financial to continue business, and instead, pursuant to the options provided in the loan documents, appointed two directors to East Dayton's Board. On February 7, 1976, the newly elected East Dayton Board decided to liquidate East Dayton and to repay Darrow with the proceeds. The individual Appellees did not approve of or participate in the decision to liquidate. At that time, because Darrow had control of the voting rights of the stock, Granzow offered to formally transfer the East Dayton stock from the escrow agent to Darrow. Darrow refused.

On April 26, 1976, East Dayton filed a Notice of Intent to Terminate the Plan with PBGC. After an investigation, PBGC notified East Dayton its Plan assets were insufficient by $326,362 to satisfy the benefits guaranteed by ERISA under Title IV. On April 27, 1976, East Dayton, with Granzow acting as President, and PBGC agreed to terminate the Plan, effective May 15, 1976, and to appoint PBGC the statutory trustee of the Plan. The parties agreed

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Escrow Agent shall either (i) cause the shares to be sold as hereinafter set forth, or (ii) shall cause the immediate election of the Board of Directors of the Company, of not less than two persons chosen by Darrow or her executors or assigns; said directors to continue in office until the Company cures the default, or, in the event the default cannot be cured in the opinion of the two directors, then Escrow Agent shall [sell the stock] . . . .

on the plan termination date, May 15, 1976, Roscommon Financial owned: (1) 100% of the East Dayton stock; (2) 88% of Dayton Casting Company stock; and (3) 90% of Advance Foundry Company stock. The parties also acknowledged the individual Appellees each owned ⅓ interest in the partnership Roscommon Realty.[3] PBGC, therefore, determined East Dayton, Roscommon Financial, Dayton Casting, Advance, Roscommon Realty and two other entities (later found not liable by PBGC) were members of the same control group as defined by 29 U.S.C. § 1301(b), and therefore, were jointly liable for the amount of $326,362.

On May 6, 1981, the Roscommon Group appealed PBGC's initial liability determination to PBGC's Appeals Board. On appeal, Roscommon Group argued they were not a control group for liability purposes because Roscommon Financial did not control East Dayton on the plan termination date. The Roscommon Group noted the loan documents, upon default, divested them of all authority and vested control in Darrow.

On April 28, 1982, the Appeals Board issued the agency's final determination finding the Roscommon Group was a member of a commonly controlled group on the plan termination date under § 4001(b) of ERISA. As such, the Roscommon Group qualified as an "employer" which maintained the Plan and was liable for the guaranteed benefits. The Appeals Board noted the Roscommon Group's tax returns indicated 100% ownership of East Dayton. This ownership entitled the Roscommon Group to $2 million in tax deductions. PBGC imposed liability upon the Roscommon Group but not upon the individual Appellees.

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[3] Roscommon Financial, Roscommon Realty, East Dayton, Dayton Casting Company, Inc. Advance Foundry Company, Inc., and individual Appellees are collectively referred to as the Roscommon Group.

On May 13, 1982, PBGC sought enforcement of the agency's determination in the United States District Court for the Southern District of Ohio. On June 22, 1982, the Roscommon Group filed an Answer, Counterclaim and a Motion for Judgment on the Pleadings. Simultaneously, the individual Appellees filed a Motion to Dismiss PBGC's complaint. Because both motions relied on the evidence in the administrative record, both were treated as summary judgment motions and were denied.

On January 23, 1985, the district court referred the case to a magistrate. The magistrate, relying on the reasoning in *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983) ("Challenge Stamping"), concluded once Roscommon Financial defaulted, the loan documents effectively transferred control to Darrow prior to the termination date. The Roscommon Group was not an employer controlling East Dayton on the Plan's termination date, and therefore, was not liable for East Dayton's unfunded benefit liabilities. The district court adopted the magistrate's recommendation and entered judgment for the Appellees. The district court also granted individual Appellees' Rule 12(b)(6) Motion to Dismiss because PBGC failed to state a cause of action with respect to them. This timely appeal followed.

II.

On appeal, PBGC argues the district court incorrectly utilized a subjective test in blatant disregard for Congress' express intent that an objective test be used to identify trade or businesses under "common control" for purposes of 29 U.S.C. § 1301(b). Additionally, PBGC argues the district court erroneously granted the individual Appellees' Motion to Dismiss. Each allegation of error will be discussed below.

A.

PBGC argues Congress expressly defined an employer for Title IV liability purposes as trades or businesses under common control with the pension plan sponsor. Further, Congress explicitly authorized PBGC to define trades and businesses under "common control" for the imposition of liability for the termination of underfunded pension plans. PBGC clearly defined "common control" as an ownership interest of 80% of the total combined voting classes or of the total value of all shares of all classes of stock connecting a group of trades and businesses ("80% control test"). Therefore, according to PBGC, the judiciary must apply PBGC's test unless the regulation is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. Thus, PBGC argues the district court erred in holding that *Challenge Stamping* was controlling precedent for this case. We agree.

1.

In January 1981, PBGC issued its initial determination advising Roscommon Financial that under 29 U.S.C. § 1362, (1) the plan sponsor and all members of its control group were liable for pension plan underfunding upon plan termination; (2) on the date of plan termination, the Roscommon Group constituted a controlled group with East Dayton as defined under Title IV; and (3) that each company in the Roscommon Group was jointly and severally liable to PBGC for $326,362.00.

On appeal, disregarding argument of actual control, PBGC's Appeals Board applied PBGC's 80% control test to the uncontested facts regarding ownership and concluded:

> East Dayton, Roscommon, Dayton, Casting, Advance Foundry, . . . and Roscommon Realty were, on the date the Plan terminated, members of a commonly controlled group under ERISA § 4001(b) and

> therefore constitute the 'employer' that maintained the Plan.

Additionally, the Appeals Board noted Roscommon Financial filed federal income tax returns on its own behalf and on behalf of the members of the Roscommon Group. In the tax returns Roscommon Financial stated it owned 100% of East Dayton's stock. The tax returns also indicated Roscommon Financial and East Dayton constituted a controlled group under the Federal Tax Code, and therefore, was entitled to approximately $2 million in tax deductions.

The district court, however, decided as a matter of law, *Challenge Stamping* was the controlling law in this case. In *Challenge Stamping*, this court reasoned that:

> There is no support for a view that Congress' chief intent in employing this test in ERISA was to invade the deepest pocket in a business failure, regardless of its responsibility to "continue funding" a pension plan of a controlled company. The purpose of the 80% regulation is obviously to find the party in *control*. When, by operation of bankruptcy law, a party is actually denied control, there is no reason to apply the regulation.

719 F.2d at 151. This court stated the conclusion in *Challenge Stamping* did not invalidate the 80% control test or establish a per se rule for all bankruptcies. *Id.* Instead, this court merely concluded the "stock did not provide any measure of control over [the corporation] at the date of termination, and thus, the regulation did not apply." *Id.* The district court opined that this case fell directly within the parameters of *Challenge Stamping's* facts stating:

> The allegation that [Challenge Stamping] applies only in bankruptcy contexts is without merit. In [Challenge Stamping], the Sixth Circuit did not limit its pronouncement to bankruptcy scenarios. Rather,

> the [Challenge Stamping] court looked to the totality of the circumstances surrounding corporate operations and actual control over the owned company or over the pension plan to determine whether or not the 80% stock ownership rule accurately defined the party with a controlling interest. In this Court's opinion, the means by which corporate control is lost is not relevant. Regardless of the means that effectuate the loss of control, the same result is achieved—the loss of control over the company operations and the pension plan. Thus, whether a company is stripped of its control by a bankruptcy court or by a secured creditor, as in this case, is insignificant; it is a distinction without a difference.

We review district court conclusions of law *de novo*. *Feldpausch v. Heckler*, 763 F.2d 229, 230 (6th Cir. 1985). After a de novo review of the record, we disagree with the district court's conclusion *Challenge Stamping* controls the instant case. In *Challenge Stamping*, a bankruptcy case, the stock purchaser *never* had actual control over the company involved or over its pension plan. Here, Roscommon Financial actually controlled East Dayton and its Plan for two and a half years. In applying *Challenge Stamping*, the district court ignored the purposes of ERISA by not imposing liability on Roscommon Financial and its controlled group for East Dayton's unfunded benefit liabilities. Because the Roscommon Group controlled East Dayton and its Plan for over two and a half years, *Challenge Stamping*'s reasoning is inapplicable. Thus, the district court erred in not applying ERISA's brightline 80% control test.

2.

Under ERISA, when a single employer pension plan is terminated, an employer is liable for the total amount of unfunded benefit liabilities on the plan termination date. 29 U.S.C. § 1362(a) (Supp. 1993). ERISA provides "all . . . trades or businesses . . . under common control shall be treated as . . . a single employer." 29 U.S.C. § 1301

(b)(1). Pursuant to the statute, the PBGC defined "common control" as "one or more chains of organizations conducting trades or businesses connected through ownership of a controlling interest . . . ." 26 C.F.R. § 11.414 (c)-(2)(1). PBGC further defined a controlling interest in the case of a corporation as:

> ownership of stock possessing at least 80 percent of the total combined voting of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation.

26 C.F.R. § 11.414(c)-2(b)(2)(a).

The parties do not dispute the Roscommon Group entities qualify as businesses under ERISA. Here, the individual Appellees equally owned Roscommon Financial and Roscommon Realty. The parties agreed on the termination date Roscommon Financial owned: (1) 100% of East Dayton stock; (2) 88% of Dayton Casting Company, Inc. stock; and (3) 90% of Advance Foundry Company, Inc. stock. Thus, all the busineses were connected through common ownership. Additionally, because the ownership exceeds 80% of the total value of stock in each business, it qualified as a "controlling" interest under ERISA. Therefore, PBGC's Appeals Board correctly concluded the Roscommon Group was a group of businesses connected through a controlling interest which qualified as an employer under section 1301(b). Consequently, we REVERSE the district court's judgment and find the members of the Roscommon Group are jointly and severally liable for East Dayton's unfunded benefit liabilities.

B.

PBGC argues the district court erred in approving the magistrate's recommendation and granting the individual Appellees' motion to dismiss. Specifically the magistrate found "PBGC has not requested a judgment against Gran-

zow, Sherman and Tormey as individuals, and therefore, a dismissal should be granted to Defendants. The Court also notes that even if a demand is made in the Complaint as against those Defendants, a dismissal would still be in order since their liability, if any, would have to be derivative from the liability if the organizational Defendants and they should be granted summary judgment." We disagree.

We review a district court's grant of a Rule 12(b)(6) motion *de novo*. *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir.), *cert. denied*, 498 U.S. 867 (1910); *Dana Corp. v. Blue Cross & Blue Shield Mutual*, 900 F.2d 882, 885 (6th Cir. 1990). Here, the district court erroneously concluded PBGC's complaint failed to request judgment against the individual Appellees. Rule 54(c) provides "every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleading." Fed. R. Civ. P. 54(c). If a pleading provides a defendant notice of the plaintiff's claims and the grounds for the claims, *Conley v. Gibson*, 355 U.S. 41, 47 (1957), omissions in a prayer for relief do not bar redress of meritorious claims. *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 66 (1978).

The complaint named the partnership Roscommon Realty as a Defendant. Both Ohio law and ERISA provide joint and several liability for partners where partnership debts exist. Ohio Rev. Code Ann. § 1775.14(B) (Anderson 1992); *see* 46 Fed. Reg. 9520, 9522-23 (Mar. 1, 1981); *Central States, Southeast & Southwest Areas Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6 (W.D. Mich. 1987), *aff'd mem.*, 892 F.2d 1043 (6th Cir. 1990). In its complaint, PBGC explicitly sought recovery for the unfunded benefit liabilities from each of the Roscommon Group members including the partnership Roscommon Realty. The complaint, therefore provided individual Appellees notice of PBGC's claims and the grounds for those claims. Additionally, PBGC's com-

plaint contained a general prayer for relief "requesting such other legal or equitable relief as may be just and proper." Other legal or equitable relief implicitly includes relief from individual partners where the partnership assets prove insufficient. Thus, we find PBGC's complaint states a course of action against the individual Appellees.

Before a creditor can seek partners' individual assets, Ohio law requires a specific determination that partnership assets are insuffiicent to meet partnership debts. *See Wayne Smith Constr. Co. v. Wolman*, 65 Ohio St. 3d 383, 391, 604 N.E.2d 157, 163 (1992). That issue, however, is not before us. The determination of the sufficiency of the partnership assets is a finding of fact and is properly determined by the district court. We, therefore, REVERSE the district court's grant of individual Appellees' Motion to Dismiss and REMAND for reconsideration consistent with this opinion.

III.

For the reasons stated above, we REVERSE and REMAND.

[Filed July 5, 1985]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. C-3-82-228
(Judge Rice)
(Magistrate Merz)

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

-vs-

THE EAST DAYTON TOOL AND DIE COMPANY, *et al.*,
Defendants

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Plaintiff, Pension Benefit Guaranty Corporation ("PBGC"), brought this action to enforce a final determination assessing liability against the Defendants East Dayton Tool and Die Company, Inc., ("East Dayton"), Dayton Casting Company, Inc., ("Dayton Casting"), Advance Foundry, Inc., ("Advance"), Roscommon Realty Company ("Roscommon Realty"), Paul H. Granzow ("Granzow"), Charles F. Sherman ("Sherman"), and Robert M. Tormey ("Tormey"). This action arises under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301 *et seq.* (1976) (amended by Pub. L. No. 96-364, 94 Stat. 1208 (1980)). Jurisdiction is founded upon 29 U.S.C. § 1303(e)(3). Venue is based upon 29 U.S.C. § 1303(e)(2).

Presently before the Court are four motions. Chronologically, they are Defendants' Motion to Dismiss as to Granzow, and Tormey; Defendants' Motion for Judgment on the Pleadings as to East Dayton, Roscommon, Dayton Casting, Advance, and Roscommon Realty; Plaintiff's Motion for Protective Order; and Defendants' Motion to Compel Discovery.

Defendants East Dayton, Roscommon Financial, Dayton Casting, Advance, and Roscommon Financial are seeking a judgment of dismissal on the pleadings under Fed. R. Civ. P. 12(c) for failure to state a claim upon which relief can be granted, or in the alternative, a trial *de novo.* Defendants base their request on the following grounds. First, they allege that the application to them of ERISA constitutes an unconstitutional taking of property in violation of the due process clause of the 5th Amendment to the United States Constitution. Defendants allege that the "taking" occurred when the Defendants (other than East Dayton), who did not maintain the East Dayton Plan were held liable for the alleged East Dayton Plan deficiency. Second, the Defendants assert that the denial by the Appeals Board of a hearing as to the "control" issue and as to the amount of the liability is a violation of both 5 U.S.C. § 556(d) and a violation of Defendants' right to procedural due process under the 5th Amendment to the United States Constitution.

Rule 12(c) provides that "If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Upon review of the Administrative Record, and in light of the holding of *In Re Challenge Stamping and Porcelain Co. v. Dickens,* 719 F.2d 146 (6th Cir. 1983), this Court finds there is no genuine issue of material fact, and these Defendants are entitled to judgment as a matter of law on the record as it now stands. Therefore, there is no need to address Defendants' arguments. The decision of the Appeals Board that Roscom-

mon Financial, Dayton Casting, Advance, and Roscommon Realty are liable to the PBGC for the deficiency of $326,362, arising under 29 U.S.C. § 1362(a) should be set aside and the Complaint dismissed. The liability of East Dayton should be affirmed, but the amount of the liability determined by the PBGC under 29 U.S.C. § 1382(b) should also be set aside.

Defendants Granzow, Sherman, and Tormey are seeking a dismissal under Fed. R. Civ. P. 12(b)(6) for Plaintiff's failure to state a claim upon which relief can be granted. These Defendants base their motion on the following grounds. First, the individual Defendants assert that they have not had a final agency action made in regard to them as to the East Dayton deficiency, as required by 5 U.S.C. § 704. Second, these Defendants assert that no judgment has been secured against Roscommon Realty (or any of the corporate defendants) and that there has not been a showing that Roscommon Realty is insolvent. This Court finds, based upon the body of the complaint, that the PBGC has not requested a judgment against Granzow, Sherman and Tormey, and therefore, a dismissal should be granted to Defendants. The Court also notes that even if a demand had been made in the Complaint as against those Defendants, a dismissal would still be in order since their liability, if any, would have to be derivative from the liability of the organizational Defendants and they should be granted summary judgment.

A review of the administrative record reveals the following undisputed facts. (Numbers in parenthesis refer to page numbers in the administrative record.) PBGC is a wholly-owned United States Government corporation established under 29 U.S.C. § 1302 to administer the pension plan termination insurance program created by Title IV of ERISA. The purposes to be carried out by PBGC are:

> "(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

> (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and
>
> (3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter."

29 U.S.C. § 1302(a).

When a pension plan is terminated with insufficient assets to pay benefits to participants, the PBGC imposes liability upon the employer who maintained the plan on the date the plan terminated. 29 U.S.C. § 1362(a). The amount of the liability is calculated under 29 U.S.C. § 1362(b). Under Title IV, the applicable definition of "employer" in terms of the issues presented is:

> ". . . All employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer."

29 U.S.C. § 1301(b).

Any employer who is liable to the PBGC under 29 U.S.C. § 1362 who neglects or refuses to pay, after demand, the amount of the liability shall have a lien in favor of the PBGC placed upon all property and rights to property, whether real or personal, belonging to such employer. 29 U.S.C. § 1368(a). In addition, 29 U.S.C. § 1302(b)(1) and (b)(8) permit the PBGC to bring suit in order to fulfill the purposes of ERISA under Title IV.

East Dayton is an Ohio corporation formed September 21, 1928. (1020). East Dayton was engaged in the manufacture, design, and sale of tools and dies for industry. Mrs. Dorothy Darrow, the daughter of the founder, William Schlman, eventually inherited all the stock in East

Dayton and held 100% of the stock until the initial sale of August 23, 1973. (1020). Mrs. Darrow's husband, Herman Darrow, was employed by East Dayton during both his father-in-law's and his wife's ownership. (1021).

East Dayton established a qualified retirement plan for its salaried employees on January 1, 1959. The East Dayton Tool and Die Company Retirement Plan for Salaried Employees ("East Dayton Plan" or "Plan") was funded through a trust with the Third National Bank and Trust Company of Dayton, Ohio ("Third National"). The plan was revised effective January 1, 1966 (163) and restated and amended effective January 1, 1969 (132).

On August 23, 1973, Mrs. Darrow sold common shares of East Dayton to Granzow, Sherman, Tormey, and Clifton C. Hawkins, for an aggregate price of $150,000. Granzow, and Tormey each held 8.42 shares. Hawkins held 2.08 shares. (829).

On August 23, 1973, the owners of all of the outstanding stock of East Dayton, including Mrs. Darrow, elected Granzow, Sherman, Tormey and Hawkins as directors of East Dayton. (1025).

On August 28, 1973, Dorothy Darrow redeemed the balance of her East Dayton stock for $1,350,000. She received $150,000. cash at the closing and the remaining $1,200,000. in the form of a promissory note. (433). Three instruments were executed at the time of the sale. These instruments included an Agreement for Sale of All of the Stock of Dorothy Darrow, a $1,200,000. Promissory Note, and an Escrow Agreement. (1025, 432). Hawkins and Tormey executed the Agreement for Sale and the Note on behalf of East Dayton. (1026). As a result of this transaction, Granzow, Sherman, Tormey and Hawkins became the sole shareholders in East Dayton. (830).

Under the terms of the note, the principal amount due was secured by all of the common stock of East Dayton, including the common shares held by Granzow, Sherman,

Tormey, and Hawkins. (1086). The shares were pledged to Dorothy Darrow and escrowed with the Escrow Agent, Third National. Mrs. Darrow then subordinated her claim against East Dayton on the note in favor of any present or future claim by Third National. (1095). The Escrow Agreement provided:

> "2. So long as company shall well and truly pay the promissory note according to its terms and tenor, the said stock certificates shall be held by the Escrow Agent, and Shareholders shall continue to have all the rights of ownership, except possession and transfer rights. At such time as the said promissory note has been fully paid, the executed assignment form and related certificates shall be redelivered to Shareholders and this Escrow Agreement shall be void and of no further force and effect.
>
> 3. Upon written notice given to Escrow Agent by Darrow of a default in the payment of any installment of interest or principal due according to the terms of said promissory note, then Escrow Agent shall either (i) cause the shares to be sold as hereinafter set forth, or (ii) shall cause the immediate election to the Board of Directors of the Company, of not less than two persons chosen by Darrow or her executors or assigns; said directors to continue in office until the Company cures the default, or, in the event the default cannot be cured in the opinion of the two directors, then Escrow Agent shall . . . ."

Subparagraphs and stated a procedure for selling the East Dayton stock. (1088-89). East Dayton was further bound to Mrs. Darrow by the language of paragraph 5:

> "5. Company, during the period that this agreement remains in effect, agrees to take such action as will cause the undertakings of the company to be performed as follows:
>
> . . . e. It will not permit consolidated working capital at any time to be less than an amount equal to

twenty percent (20%) of the unpaid balance of the note outstanding to Darrow." (1091).

After the August 28, 1973 transaction, the following officers were elected by the shareholders: Robert Tormey, Chairman of the Board; Clifton C. Hawkins, Jr., President and Chief Executive; Charles Sherman, Treasurer; Paul H. Granzow, Secretary; and Michael Hennessey, Assistant Treasurer and Assistant Secretary. (1028). During the tenure of Granzow, Sherman and Tormey as owners and officers, East Dayton was managed by James Nick and Clifton Hawkins. (1030).

Roscommon Financial Corporation was incorporated on March 22, 1973, with Granzow, Sherman, and Tormey each owning 33⅓% of the stock. They were elected directors on January 22, 1974. (830). In later acquisitions, Roscommon Financial came to own 100% of East Dayton stock and 88% of the stock of Dayton Casting Company. Dayton Casting Company held 90% of the stock of Advance Foundry Company.

Granzow, Sherman, and Tormey were also partners in three other business ventures. Granzow, Sherman, Tormey and Westendorff each owned 25% of Fillmore Leasing Company, a partnership. Granzow, Sherman, Tormey and Watson each owned 25% of Southwest Insurance Agency, a partnership. Finally, Granzow, Sherman, and Tormey each owned 33⅓% of Roscommon Realty, a partnership. Of these partnerships, only Roscommon Realty and the individual partners, Granzow, Sherman, and Tormey are Defendants in this action.

On February 8, 1974, Granzow, Sherman, and Tormey transferred their East Dayton Common Stock to Roscommon Financial. (870). Cliff Hawkins retained his 10% interest separate and distinct from Roscommon.

On August 20, 1975, Roscommon Financial transferred 2.525 shares of its East Dayton stock to James G. Nick, who became President and General Manager of East Dayton. (1232).

On April 14, 1976, James G. Nick transferred his 2.525 shares of East Dayton back to Roscommon, and Clifton Hawkins, Jr. transferred his 2.8 shares of East Dayton to Roscommon, making Roscommon Financial the record holder of 100% of the shares of East Dayton since that date. (1232).

Between August, 1973 and December, 1975, East Dayton's business continued to decline. (1031). Attempts to secure additional financing were futile. Finally, on January 26, 1976, Dorothy Darrow informed the Escrow Agent, Tormey, Granzow, Sherman, Hawkins, and East Dayton that the Escrow Agreement of August 28, 1973, had been breached:

> "1. Pursuant to paragraphs 3 and 6b thereof, in that the interest due December 1, 1974, of $18,381.55 has not been paid,
>
> 2. Pursuant to paragraph 5e consolidated working capital has been permitted to be less than 20% of the unpaid principal balance of the Promissory Note owing to Dorothy Darrow.
>
> 3. Pursuant to Paragraph 2, shareholders have transferred rights of ownership in the escrowed stock certificates to Roscommon Financial Corporation, on February 8, 1974, contrary to the provisions of this paragraph."

On February 6, 1976, a special meeting of East Dayton shareholders was held. At that time, Granzow, Sherman and Tormey resigned as officers and directors of East Dayton. (1099). Mr. Schaeffer (Mr. Darrow's attorney) and Mr. Darrow were elected as directors of East Dayton pursuant to Mrs. Darrow's right in the Escrow Agreement to cause the election of not less than two directors. (1032). Hawkins and Nick continued as directors subject to the direction of Mr. Darrow and Mr. Schaeffer. (1032).

On February 7, 1976, another meeting was called by Herman Darrow. At that time, Mr. Darrow and Mr.

Schaeffer announced that East Dayton would discontinue its business operations, fulfilling only those orders which had already been placed. Hawkins, Nick, Herman Darrow, and Schaeffer would share the liquidation duties. As soon as the orders were completed, the machinery, equipment, and real estate of East Dayton were to be sold to satisfy creditors. Additionally, the East Dayton Plan would be terminated. (1033-34). At that time, Paul Granzow offered to effect a formal transfer of the East Dayton shares from the escrow account to Mrs. Darrow. (1039). Mrs. Darrow refused to accept the stock. (1035).

East Dayton ceased all active plant operations on or about March 31, 1976. (831). On April 25, 1976, PBGC was sent notice by Clifford Hawkins of East Dayton's intent to terminate their retirement plan. (120). This notice was received by the PBGC on May 4, 1976. (831). On May 3, 1976, a special meeting of the Board of Directors of East Dayton was held. At that meeting, Herman Darrow, Cliff Hawkins, and James Nick voted to terminate the Plan. (1211). The East Dayton Retirement Plan was officially terminated by the PBGC on May 15, 1976. (1232).

On April 27, 1977, the PBGC was appointed Trustee of the Plan by written agreement executed and effective that date. The Trusteeship Agreement was signed by the Acting Executive Director, PBGC, and by the President of East Dayton. (1232).

After appointment as Trustee, the PBGC began investigation of the Plan as early as June, 1977. At that time, East Dayton and Roscommon provided PBGC with information relating to East Dayton and the East Dayton Plan, but refused to permit PBGC investigators to have access to documents relating to Roscommon Financial or its other subsidiaries. (1300).

Subsequent requests by the PBGC for information rellating to Roscommon and its subsidiaries were also met

with refusal by Roscommon and East Dayton. (1300). On March 17, 1978, the PBGC mailed a formal, written request to Roscommon, asking for the production of certain documents by March 29, 1978. This date was later extended to April 10, 1978. Upon Roscommon's failure to honor the PBGC's written request, the PBGC issued an administrative subpoena *duces tecum* on April 10, 1978, demanding the production of specified documents by May 2, 1978. Roscommon refused to comply with the subpoena, and on April 26, 1978, Roscommon and East Dayton filed a complaint in this Court in case C-3-78-99. They asked the Court to grant a declaratory judgment negating the liability of Roscommon and East Dayton to the PBGC and enjoining the enforcement of the PBGC subpoena. (1277).

On December 5, 1979, the PBGC instituted case number C-3-79-425 requesting the Court to order Robert Tormey to appear before the PBGC and produce certain documents demanded by the subpoena of April 10, 1978. (1687). Case numbers C-3-78-99 and C-3-79-425 were consolidated on December 27, 1979. (1730). The consolidated complaint was dismissed without prejudice on January 25, 1980. (1748). Pursuant to that Order, Roscommon agreed to produce certain documents for the PBGC. (1749).

On January 22, 1981, the PBGC finalized determination of the alleged asset insufficiency under the East Dayton Plan. The PBGC concluded that the East Dayton Plan had insufficient assets in the amount of $326,362., and that East Dayton, Roscomon, Dayton Casting, Advance, Fillmore Leasing, Southwest Insurance, and Roscommon Realty were all members of the same controlled group as defined by 29 U.S.C. § 1301(b), and as such were jointly liable for the entire $326,362. (811-13). On May 5, 1981, these same parties filed an appeal with the PBGC, requesting an opportunity to appear at the Appeals hearing. (823-24). On February 11, 1982, the Appeals Board denied Appellants' request to appear at the hearing. (906).

A modified determination was issued on April 28, 1982, which dismissed Southwest Insurance as a member of the "commonly controlled" group, left open an opportunity for further consideration of the status of Fillmore Leasing, and affirmed the balance of the initial determination. (1229). Appellants requested reconsideration of the status of Fillmore Leasing on April 29, 1982, and on May 5, 1982, the Appeals Board dismissed Fillmore Leasing from liability to the PBGC. (1265). Formal demand for payment was made to the remaining parties on April 29, 1982. (1266-67). Payment was not made to the PBGC, and on May 13, 1982, the PBGC brought this action to enforce the final agency determination of liability.

The PBGC is an agency as defined under the Administrative Procedure Act ("APA"). 5 U.S.C. § 701(b)(1). *PBGC v. Hathaway Machinery Co.*, 566 F. Supp. 1223 (1983). A final determination of this Agency is subject to the narrow scope of review prescribed in 5 U.S.C. § 706(2). *Id* at 1224. 5 U.S.C. § 706(2) provides that:

> "The reviewing court shall
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."

In reaching a conclusion, this Court was required to consider two issues: the definition of "control" used in finding responsibility for the underfunded pension plan and the method used to find the amount of the liability in light of the scope of review set out in 5 U.S.C. § 706(2).

29 U.S.C. § 1362(a) sets out who is liable for any plan deficiency:

> ". . . any employer who maintained a plan (other than a multiemployer plan) at the time it was terminated. . . ."

"Employer" as defined under 29 U.S.C. § 1301(b):

> ". . . For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which an under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. . . ."

The PBGC had adopted, pursuant to statute, Treasury Regulation 26 C.F.R. § 11.414(c)-2(b)(1) which defines "parent-subsidiary group of trades or businesses under common control":

> "The term 'parent-subsidiary group of trades or businesses under common control' means one or more chains or organizations conducting trades or businesses connected through ownership of a controlling interest with a common parent organization. . . ."

26 C.F.R. § 11.414(c)-2(b)(2)(A) defines controlling interest for purposes of paragraphs (b) and (c):

> "In the case of an organization which is a corporation, ownership of stock possessing at least 80% of the total combined voting power of all classes of stock entitled to vote of such corporation or at least 80% of the total value of shares of all classes of stock of such corporation."

26 C.F.R. § 11.414(c)-2(c)(1) defines "brother-sister group of trades or businesses under common control":

> "The term 'brother-sister group of trades or businesses under common control' means two or more organizations conducting trades or businesses if (i) the same five or fewer persons who are individuals, estates, or trusts own (directly and with the application of 11.414(c)-(4), singly or in combination, a controlling interest of each organization, and (ii) taking into account the ownership of each such person, only to the extent such ownership is identical with respect to each

such organization, such persons are in effective control of each organization."

26 C.F.R. § 11.414(c)-2(c)(2) defines "effective control" for purposes of paragraph c:

> "(i) In the case of an organization which is a corporation, such persons own stock possessing more than 50 percent of the total combined voting power of all classes of stock entitled to vote of such corporation or more than 50 percent of the total value of shares of all classes of stock of such corporation.
>
> (iii) in the case of an organization which is a partnership, such persons own an aggregate of more than 50 percent of the profits interest or capital interest of such partnership."

29 C.F.R. § 11.414(c)-2(d) defines "combined group of trades or businesses under common control":

> "The term 'combined group of trades or business under common control means any group of three or more organizations, if (1) each such organization is a member of either a parent-subsidiary group of trades or businesses under common control or a brother-sister group of trades or businesses under common control, and (2) at least one such organization is the common parent organization of a parent-subsidiary group of trades or businesses under common control and is also a member of a brother-sister group of trades or businesses under common control."

The Appeals Board found that on the date the East Dayton Plan terminated, Roscommon Financial held a 100% interest in East Dayton and, by 26 C.F.R. § 11.414 (c)-2(b)(1) constituted a "parent-subsidiary group of trades or businesses under common control." (1236).

The Appeals Board also found that Roscommon Financial was also in a parent-subsidiary relationship with Dayton Casting and Advance Foundry because Roscommon

held 88% interest in Dayton Casting and, in turn, Dayton Casting held a 90% interest in Advance. (1238).

The Appeals Board also found that Roscommon Finanical and Roscommon Realty were, on the date the plan terminated, a "brother-sister group of trades or businesses under common control" by 29 C.F.R. § 11.414(c)-2(c)(1). (1241). This finding was based on the fact that Granzow, Sherman, and Tormey owned, in combination, stock possessing at least 80% of the total value of shares of all classes of stock of the two companies, and the three of them owned stock representing greater than 50% of the total value of shares of all classes of stock of the three companies.

The Appeals Board also found that Roscommon Financial, East Dayton, Dayton Casting, Advance, and Roscommon Realty constituted a "combined group of trades or business under common control "by 29 C.F.R. § 11.414(c)-(2)(d). (1243). Such a finding made Roscommon an "employer" under 29 U.S.C. § 1301(b) and subject to liability under 29 U.S.C. § 1362(a).

The Appeals Board of the PBGC looked only to the "plain meaning" of the statute to impose liability upon defendants. It considered only the administrative record; any further explanation as to who "controlled" East Dayton on the date of the plan termination was excluded. In *In re Challenge Stamping and Porcelain Co. v. Dickens,* 719 F.2d 146 (6th Cir. 1983) the Court looked beyond the plain meaning of the regulation defining controlling interest in a terminated company and considered the purpose of Title IV of ERISA:

> "The purposes of Title IV are stated expressly in § 1302(a): (1) to encourage the operation and continuation of private pension plans; (2) to protect employees' pension benefits; and (3) to keep the insurance premiums paid to the PBGC as low as possible. In addition, the legislative history demonstrates the congressional purpose of imposing employer li-

> ability in order to prevent employers from abusing the termination insurance program by shifting their financial burden under penison plans to the PBGC or by making unrealistic promises to employees.

Dickens, citing *A-T-O Inc. v. Pension Benefit Guaranty Corp.*, 634 F.2d 1013, 1025 (6th Cir. 1980).

The Court also considered the comments of Senator Williams, one of the primary draftsman of the legislature:

> "Since there would be a possibility of abuse of solvent employers who terminate a plan and shift the financial burden to the insurance program, notwithstanding their own financial ability to continue funding the plan, the conference bill imposes liability on employers whose plans terminate, to reimburse the program for benefits paid by the corporation. . . ."

Id., at 150 citing 120 Cong. Rec. § 15737 (daily ed. Aug. 22, 1974) (remarks of Sen. Williams), reprinted in [1974] U.S. Code Cong. & Ad. News 4639, 5038, 5185.

The *Dickens* court interpreted 29 U.S.C. § 1301(b) to be one method Congress used to inhibit the shift of pension funding to the government by solvent employers. Section 1301(b) mandates that "all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer", and that the definition of "common control" in ERISA's regulations "be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26." These treasury regulations have been construed by the Supreme Court in *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982) as an objective test for determining control. The Court in *Dickens* interpreted the regulation to find the party in control.

> "It seems apparent that by this objective test to determine common control Congress was seeking to

> place responsibility (and liability) upon the party actually in control so as to insure that control would be exercised responsibly and for proper reasons; i.e., no shifting of pension obligations, no multiple use of small business tax relief.
>
> There is no support for a view that Congress' chief intent in employing this test in ERISA was to invade the deepest pocket in a business failure, regardless of its responsibility to 'continue funding' a pension plan of a controlled company. The purpose of the 80% regulation is obviously to find the party in *control*. When, by operation of bankruptcy law, a party is actually denied control, there is no reason to apply the regulation."

Id. at 151.

The *Dickens* court was quick to point out that "this conclusion neither invalidates the regulation at issue nor establishes a *per se* rule applicable to all bankruptcies." The Court simply looked to the fact that "CSP stock did not provide *any* measure of control over Puffer-Hubbard at the date of termination, and thus, the regulation did not apply". *Id.*

Just as in *Dickens,* the administrative record here reveals that Defendants Roscommon Financial, Dayton Casting, Advance, Roscommon Realty, Granzow, Sherman, and Tormey lacked any measure of control over East Dayton at the time of termination. Upon notice of the breach from Mrs. Darrow, and then officially at the February 6, 1976 meeting, Granzow, Sherman and Tormey forfeited their East Dayton control to Mrs. Darrow under the terms of the August 28, 1973 Escrow Agreement. The breach of the Escrow Agreement resulted in a total loss of their ownership rights in the East Dayton stock. During this same meeting, Granzow, Sherman and Tormey resigned as officers and directors of East Dayton. From that day on, Mrs. Darrow had total control over the operation of East Dayton. She chose a new Board of

Directors which decided to shut down the business, sell the machinery, equipment and building, and terminate the East Dayton Plan. Defendants Granzow, Sherman, and Tormey held only "paper" title, title which had been refused by Mrs. Darrow at the February 6, 1976, meeting.

There is no evidence in the administrative record that Defendants were attempting to shift liability on to the PBGC. There is no evidence in the administrative record that application of the objective test of 1301(b) and CFR 26 § 11.414(c)-2(b)(c)(d) would satisfy congressional intent. Here, as in *Dickens,* congressional intent is served by setting aside the decision of the Appeals Board as to Defendants Roscommon Financial, Dayton Casting, Advance, Roscommon Realty, Granzow, Sherman, and Tormey.

East Dayton, however, remains liable to the PBGC for any deficiency found.

Therefore, it is necessary to reach the issue of the amount of the liability.

29 U.S.C. § 1362(b) states that an employee who maintained a plan on the date of termination will be liable to the PBGC in an amount equal to the lesser of two calculations:

> "(1) the excess of:
>
> (A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over
>
> (B) the current value of the plan's assets allocable to such benefits on the date of termination, or
>
> (2) Thirty percent of the net worth of the employer determined as of a day, chosen by the corporation, but not greater than 120 days prior to the date of termination, computed without regard to any liability under this section."

Based upon the above holding finding that only East Dayton is liable to the PBGC, and upon the administrative record, the second calculation, 29 U.S.C. § 1362(b)(2), produces the lesser amount. This lesser amount is -0- liability. Several documents in the administrative record support this conclusion. Granzow, by affidavit, stated that on December 31, 1975, the shareholders' equity in East Dayton was a negative $331,502. (1037). A balance sheet found on page 465 of the administrative record supports this statement. In this same affidavit, Granzow stated that during January, 1976, the financial condition of East Dayton continued to decline so that by February 6, 1976, the financial condition of East Dayton was worse then it had been as of December 31, 1975. (1037). Granzow also stated that on March 31, 1976, the shareholders' equity in East Dayton was a negative $379,255. A balance sheet found on page 475 of the administrative record supports this statement. Finally, Granzow stated that a negative shareholder equity in East Dayton existed in May, 1976, at the time the East Dayton Plan was terminated by Mrs. Darrow and her representatives. (1037).

Additional support for this conclusion is based on the affidavit of Clifford Hawkins in which Hawkins stated that at the time of the termination of the East Dayton plan, there was a negative shareholders' equity and East Dayton's liabilities far exceeded its assets. (1189).

Finally, the consolidated balance sheet as of 12-31-75 attached to the corporate tax return, Form 1120 of Roscommon Financial Corporation reveals a negative shareholder equity in East Dayton of $333,255.96. (653)

The net worth calculation of 29 U.S.C. § 1362(b)(2) is limited to a day within a period from 120 days prior to termination until the date of plan termination. Since there was no net worth at any time during this period, then the calculation under 29 U.S.C. § 1362(b)(2) is zero (0) and East Dayton has no liability to the PBGC.

IT IS THEREFORE RECOMMENDED THAT:

Defendants' motion to dismiss as to Granzow, Sherman and Tormey be GRANTED;

Defendants' motion for judgment on the pleadings as to East Dayton, Roscommon, Dayton Casting, Advance, and Roscommon Realty be GRANTED;

Plaintiffs' motion for protective order is moot.

Defendants' motion to compel discovery is moot.

July 5, 1985

/s/ Michael R. Merz
MICHAEL R. MERZ
United States Magistrate

[Filed Dec. 24, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-3-82-228

Judge Walter Herbert Rice

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

vs.

THE EAST DAYTON TOOL AND
DIE COMPANY, INC., *et al.*,
Defendants.

DECISION AND ENTRY ADOPTING THE INITIAL AND SUPPLEMENTAL REPORTS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOCS. #39 and #56); MOTION TO DISMISS OF DEFENDANTS GRANZOW, SHERMAN AND TORMEY (DOC. #6) SUSTAINED; MOTION OF REMAINING DEFENDANTS FOR JUDGMENT ON THE PLEADINGS (DOC. #7) SUSTAINED; PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER (DOC. #22) AND DEFENDANTS' MOTION TO COMPEL DISCOVERY (DOC. #26) DEEMED MOOT; JUDGMENT TO BE ENTERED FOR DEFENDANTS AND AGAINST PLAINTIFF; TERMINATION ENTRY

This matter [1] is before the Court pursuant to Plaintiff Pension Benefit Guaranty Corporation's ("PBGC") Ob-

[1] This action arises under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1301 *et. seq.* (1976) (amended by Pub. L. No. 96-364, 94 Stat. 1208 (1980)). Jurisdiction is founded upon 29 U.S.C. § 1303(e)(3). Venue is based upon 29 U.S.C. § 1303(e)(2).

jections (Docs. #61 and #68), filed under 28 U.S.C. § 636(b)(1)(C), to the Magistrate Judge's Supplemental Report and Recommendations which recommended that PBGC's Objections did not require any modification of the Recommendations set forth in his original Report (Doc. #39), and incorporated by reference into the Supplemental Report and Recommendations (Doc. #56). In the original Report, entered on July 5, 1985, the Magistrate Judge recommended the granting of the Motion to Dismiss (Doc. #6) of Defendants Paul H. Granzow ("Granzow"), Charles F. Sherman ("Sherman"), and Robert M. Tormey ("Tormey")[2] *and* the Motion for Judgment on the Pleadings of the other Defendants (Doc. #7), East Dayton Tool and Die Company, Inc. ("East Dayton"), Dayton Casting Company, Inc. ("Dayton Casting"), Roscommon Realty Company ("Roscommon Realty"), Roscommon Financial Corporation ("Roscommon Financial") and Advance Foundry, Inc. ("Advance")[3] (Doc. #39).

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[2] Defendants Granzow, Sherman and Tormey moved this Court under Fed. R. Civ. P. 12(b)(6) for an Order dismissing PBGC's Complaint seeking the enforcement of a final determination by the PBGC Appeals Board ("Appeals Board") assessing liability against Defendants East Dayton, Dayton Casting, Advance, Roscommon Realty, Roscommon Financial, Granzow, Sherman and Tormey for an asset deficiency relating to the termination of East Dayton's underfunded retirement plan ("Plan") (IV R. Doc. #17 at 1229-1248). The Appeals Board found liability for the $326,362. deficiency in the Plan on the basis that the Roscommon Defendants were trades and businesses "under common control" with East Dayton under 29 U.S.C. § 1301 on May 15, 1976, the date the Plan was terminated.

[3] Defendants East Dayton, Roscommon Financial, Roscommon Realty, Dayton Casting, and Advance moved this Court, under Fed. R. Civ. P. 12(c), for an Order granting judgment on the pleadings and dismissing the Complaint for failure to state a claim upon which relief can be granted, or in the alternative, a trial *de novo*. Although the Magistrate granted East Dayton's motion for judgment on the pleadings, the text of the Report states that "the liability of East Dayton should be affirmed, but the amount of the liability determined by the PBGC should be set aside." (Doc #39 at 2).

Under 28 U.S.C. § 636(b)(1)(C), this Court, upon objections being made to the Magistrate Judge's Report, is required to make a *de novo* review of those recommendations to which objection is made. This Court has re-examined all the relevant evidence in this case, previously reviewed by the Magistrate Judge, and has determined, as did that judicial officer, that the Appeals Board's decision was not supported by "substantial evidence." *See Lashley v. Secretary of Health & Human Services*, 708 F.2d 1048, 1053 (6th Cir. 1983); *Hill v. Duriron Co., Inc.*, 656 F.2d 1208 (6th Cir. 1981). Accordingly, based on the following reasoning, this Court adopts the Magistrate Judge's Reports and Recommendations (Docs. #39, 56).

A. *The Parties' Arguments*

PBGC makes numerous challenges to the Magistrate Judge's Report, claiming that: (1) the Magistrate Judge erred by applying the holding in *In Re Challenge Stamping & Porcelain Co. v. Dickens*, 719 F.2d 146 (6th Cir. 1983) ("*Dickens*")[4] (a decision which Plaintiff contends is limited strictly to the facts of that case), to this case instead of applying *PBGC v. Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) ("*Ouimet*") and the stock ownership test set out in the

[4] The Sixth Circuit Court of Appeals held that withdrawal liability for an underfunded pension plan will not be enforced against a company which purchased stock of the employer's parent company when the operation of the purchased company was beyond the purchaser's control. *Dickens*, 719 F.2d at 151 The *Dickens* court ruled that the 80% stock ownership test is not an exclusive measure of control and looked to equity factors before imposing employer liability for pension plan shortfalls. *Id.* at 150-51 In so holding, the court recognized that "the purpose of the employer liability provisions . . . [was] to prevent employers from abusing the termination insurance program." *Id.* at 150. Under the circumstances of that case, the court refused to apply the 80% regulation, notwithstanding the purchaser's ownership of all the acquired company's stock, because the operation of bankruptcy law actually denied the purchasing company control. *Id.* at 151.

pertinent statutory and regulatory provisions[5] for identifying trades or businesses "which are under common control" with the retirement plan sponsor; (2) the Magistrate Judge exceeded his authorized scope of review under 5 U.S.C. § 706(2)(A)[6] by making findings of fact and substituting his own conclusions and judgment for those of the Appeals Board and by failing to give proper deference to the Appeals Board's reasoning and factual findings; (3) even assuming, *arguendo*, that the Magistrate Judge's findings are authorized, he disregarded material evidence on the issue of control; and (4) the Magistrate Judge erred in dismissing individual Defendants, Granzow, Sherman and Tormey (Docs. #46, 47, 50, 61, 68) Plaintiff's arguments and, therefore, its Objections are not well taken.

B. *Dickens Is Controlling Law*

As a preliminary matter, it is important to note that although several courts outside this circuit have strictly applied the statutory criteria at issue in this case, this Court is bound by *Dickens*, a decision of the Court of

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[5] Under regulations prescribed by the PBGC, "trades or businesses under common control" are treated as a "single employer" for purposes of ERISA withdrawal liability. 29 U.S.C. § 1301(b)(1). These regulations are coextensive with regulations prescribed by the Secretary of the Treasury under 26 U.S.C. § 414(c). Those regulations define a group "under common control" as a parent-subsidiary group, brother-sister group, or combined group. The regulations define these terms according to the degree and nature of common stock ownership.

[6] The Administrative Procedure Act, 5 U.S.C. § 702, authorizes judicial review of agency action. Section 706(2) provides, in pertinent part, that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action . . . [and] shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ."

Appeals for the Sixth Circuit. S.D. Ohio R. 4.1.2.[7] The First Circuit Court of Appeal's decision in *Ouimet* is not controlling in this circuit. Based on the following explanation and for the reasons stated by the Magistrate Judge, this Court holds that the Magistrate Judge's reliance on *Dickens* was not misplaced. The *Dickens* holding, rather than the *Ouimet* decision, must govern the review of the Administrative Record in this case.

PBGC asserts that the holding of *Dickens* is inapplicable to the facts of this case because *Dickens* is limited only to bankruptcy cases, where the court, rather than the stock owner, has control over the operations of the business (Doc. #47 at 9-11). PBGC claims that the holding in *Ouimet*, requiring strict application of the 80% stock ownership test to determine a "control group" for purposes of assessing employer liability under the common control regulations in 29 U.S.C. § 1301(b), should control. In support of its position, PBGC points out that the pertinent ERISA and Internal Revenue Code ("IRC") rules and regulations require only a stock ownership test[8] for de-

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[7] *See, Teamsters Pension Trust Fund v. Central Mich. Trucking, Inc.*, 857 F.2d 1107 (6th Cir. 1988) (quoting *Dickens*); *Central States Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6 (W.D. Mich. 1987), *aff'd without op.*, 892 F.2d 1043 (6th Cir. Mich. 1990) (same); *Tri-State Rubber & Equipment v. Central States Pension Fund*, 677 F. Supp. 516 (E.D. Mich. 1987) (same); *Central Transp. Inc. v. Central States Area Pension*, 639 F. Supp. 788 (E.D. Tenn. 1986) (same); *Central Transp. Inc. v. Central States Area Pension*, 640 F. Supp. 56 (E.D. Tenn. 1986) (same).

[8] The controlling interest test of 26 C.F.R. § 1.414(c)-2(b)(2)(A) is defined as follows:

> (A) In the case of an organization which is a corporation, ownership of stock possessing at least 80 percent of total combined voting power of all classes of stock entitled to vote of such corporation or at least 80 percent of the total value of shares of all classes of stock of such corporation; . . .
>
> * * * *
>
> (C) In the case of an organization which is a partnership, ownership of at least 80 percent of the profits interest or capital interest of such partnership.

termining the members of a controlled group and not an additional showing of actual control (Doc. #61 at 4-5). PBGC argues that the Magistrate Judge was bound to uphold its permissible interpretation of the ERICA statutory framework (*Id.* at 3-5).

This Court concludes this case falls squarely under the *Dickens* precedent.

The allegation that *Dickens* applies only in bankruptcy contexts is without merit. In *Dickens*, the Sixth Circuit did not limit its pronouncement to bankruptcy scenarios. Rather, the *Dickens* court looked to the totality of circumstances surrounding corporate operations and actual control over the owned company or over the pension plan to determine whether or not the 80% stock ownership rule accurately defined the party with a controlling interest. In this Court's opinion, the means by which corporate control is actually lost is not relevant. Regardless of the means that effectuate the loss of control, the same end result is achieved—the loss of control over company operations and the pension plan. Thus, whether a company is stripped of its control by a bankruptcy court or by a secured creditor, as in this case, is insignificant; it is a distinction without a difference.

What is relevant is whether a particular party had control. In *Dickens*, the Sixth Circuit defined the term "control," for the purpose of fixing responsibility for underfunded pension plans, by considering notions of fairness in order to avoid an unjust result in determining group responsibility for the pension plan deficit.[9] Hence, the equitable theory embraced by the *Dickens* court seems to require a showing of actual control over corporate operations and liability for an underfunded pension plan will not

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[9] Interestingly, the *Ouimet* court similarly recognized notions of fairness in holding the Ouimet Group such a group under common control and treating that group as one employer. *Ouimet*, 630 F.2d at 12. (1st Cir. 1980).

be enforced against a corporate entity when its operation was beyond that entity's control.

PBGC's allegations that the Magistrate Judge rewrote the statutory and regulatory provisions governing the issue of "control", by failing to apply the statutory stock ownership test, is also without merit. A legislative definition does not always exclude other appropriate meanings that naturally belong to the words and "[i]t will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid [results leading to injustice, oppression, or absurd consequence]." *United States v. Kirby*, 74 U.S. 482, 486-87 (1868). This Court agrees with the Sixth Circuit's application of the well-settled principles of construction that emphasize the interpretation of the provisions at issue in this case should not be read and interpreted "so as to lead to unreasonable or unjust results." *United States v. American Trucking Ass'ns.*, 310 U.S. 534, 542-44 (1940). *Accord. Steiner v. Mitchell*, 215 F.2d 171, 173 (6th Cir. 1954), *aff'd*, 350 U.S. 247 (1956) (when aid to construction of meaning of words as used in statute is available no rule of law forbids its use however clear the words may appear on superficial examination). Based on the foregoing analysis, this Court concludes that the Appeals Board decision to hold Defendants liable for the asset deficiency in East Dayton's retirement plan, a decision based upon the mechanistic utilization of the 80% stock ownership test, did not have a reasonable basis in law. Accordingly, this Court will not reject the Magistrate's Report on that basis.

C. *The Standard of Review*

The gist of PBGC's argument is that the Magistrate failed to give the required amount of judicial deference to the Appeal Board's interpretation of the law and findings of fact in this case. PBGC claims that the Magistrate was only required to determine whether the Appeals Board's final decision was based on considerations of the relevant factors in the case and whether there was a clear error of

judgment. PBGC insists that the Magistrate both ignored the Appeals Board's careful examination of the evidence and contentions presented in the administrative proceedings and made his own factual findings [10] without discussing in what respect the facts or conclusions found by the Appeals Board were violative of section 706(2)(A). PBGC further argues that since the Magistrate did not formally identify or discuss the evidence in the administrative record which supported the Appeals Board's final determination, the Magistrate ignored that record and his recommendations must, therefore, be incorrect and this Court must, accordingly, affirm the Appeals Board's findings (Doc. #68 at 8).

Judicial review of administrative actions is governed by whether or not the review involves legal or factual questions. Generally, a reviewing court decides all relevant questions of law and may substitute its judgment for that of the agency where agency action is not in accordance with law. *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-76 (1973) ("courts are the final authorities on issues of statutory construction, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute' ") (citations omitted); *see also National Labor Relations Board v. Brown Food Store*, 380 U.S. 278, 291-92 (1965) (same). Factual questions are afforded greater deference. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944) (deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole). It is of critical importance, therefore, that this Court determine whether the matters considered by the Magistrate Judge present factual or legal issues. The United States Supreme Court has noted

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[10] PBGC's maintains that the administrative record did not support the Magistrate's factual findings and conclusions.

that courts are provided with little guidance for distinguishing questions of fact from questions of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. [No] . . . rule or principle . . . will unerringly distinguish a factual finding from a legal conclusion) (citation omitted); *see also Baumgartner v. United States*, 322 U.S. 665, 670-71 (1944).

PBGC accuses the Magistrate Judge of making factual findings—that Defendants lacked control over East Dayton at the time the pension plan was terminated and that the notice of default under the Escrow Agreement resulted in a total loss of Defendant's ownership rights in East Dayton stock—independent of and in contradiction to the facts contained in the Administrative Record and the findings made by the Appeals Board. PBGC cites additional instances where it believes the Magistrate Judge acted as an unauthorized factfinder by finding that: (1) Hawkins and Nick, who continued as East Dayton directors after February 6, 1976, were thereafter subject to the direction of Mr. Darrow and Attorney Schaeffer; (2) the Plan was officially terminated by the PBGC on May 15, 1976; (3) the Appeals Board denied Appellants' [11] request to appear at the hearing held before the Board; (4) from February 6, 1976, on, Mrs. Darrow had total control over the operation of East Dayton; (5) Dorothy Darrow alone chose a new Board of Directors which decided to shut down the business, sell the machinery, equipment and building, and terminate the East Dayton Plan; (6) since February 6, 1976, Granzow, Sherman and Tormey have held only paper title to East Dayton; and (7) congressional intent is served by setting aside the decision of the Appeals Board

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[11] The parties designated as "Appellants" in the Magistrate's Report are: East Dayton, Roscommon Financial, Dayton Casting, Advance, Roscommon Realty, Fillmore Leasing Company ("Fillmore") and Southwest Insurance Company ("Southwest") (IV R. Doc. 17 at 823, 900).

(Docs. #46, 47, 50, 61, 68). PBGC's also objects to the finding and conclusion of the Magistrate Judge that PBGC failed to request a judgment against Granzow, Sherman and Tormey, and therefore, a dismissal should be granted to those defendants (*Id.*). Finally, PBGC objects to the Magistrate Judge's failure to note that the Administrative Record shows that Roscommon Financial, Dayton Casting and Advance represented in their 1976 and 1977 federal income tax returns that they were 100% legal and equitable owners of East Dayton and that they did not identify Mrs. Darrow or anyone else as the holder of any interest in East Dayton (Doc. #61, at 2-3). Since these objections appear to focus on indicia of control, this Court agrees with the Magistrate Judge's observation that the present case narrows itself down to the question of what entity was in actual control of East Dayton when the pension plan was terminated.

D. *DE NOVO EXAMINATION OF FACTS*

The Court now turns toward its obligation to examine the Report and Supplemental Report on a *de novo* basis. In so doing, the Court notes that it has examined the entire record. In addition, the Court has analyzed the legal arguments and factual references raised by PBGC. This review of the voluminous administrative record and further submissions reflect that the Magistrate Judge employed the proper standard of review in this action. In this Court's view, the Magistrate Judge made no new findings of fact. Rather, he considered all relevant indicia of control noted by the Appeals Board and contained in the Administrative Record, including the undisputed facts. The Magistrate Judge engaged in a weighing and balancing of the factual considerations that had developed during the administrative proceedings herein and arrived at the required legal conclusions. This Court holds, therefore, that the Magistrate Judge's determinations on the issue of control were legal conclusions. As previously noted, questions of law, unlike questions of fact, are freely reviewable. This Court

notes that the Magistrate Judge adequately stated the reasons for his legal conclusions, and the record indicates that they were based upon properly considered facts in the Administrative Record. In that regard, this Court is confident the Magistrate Judge did not disregard any facts in the Administrative Record that were relevant to the material issue of control.

Upon *de novo* review, this Court found the record replete with evidence relevant to the particular findings under attack in this case. Regarding the issue of control, for example, the record establishes that the East Dayton termination date was May 15, 1976 (IV R. Doc. #17 at 1229). Other documents in the record support this finding (I R. Doc. #14 at 43, 79). The record also indicates that the Appeals Board considered the issue of whether or not Roscommon was the "beneficial owner" of the East Dayton stock on the date the Plan terminated (*Id.* at 1230, 1234). This Court can infer from the following language contained in the Appeals Board decision that it considered the same evidence on the issue of control as did the Magistrate Judge:

> In reaching the conclusion that appellant Roscommon was legal and beneficial owner of the East Dayton stock, the Board considered all material and arguments submitted by appellants (*Id.* at 1236 n. 1)

The Administrative Record also reveals that the Appeals Board denied the request of East Dayton, the Roscommon Defendants, Dayton Casting, Advance, Fillmore and Southwest for an oral hearing (*Id.* at 906). Additionally, various documents in the record, such as the three instruments executed at the time Darrow sold her remaining East Dayton stock,[12] the Tormey, Granzow and Sherman letters

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[12] The three instruments executed by Granzow, Sherman, Tormey and Clifton C. Hawkins were an Agreement for Sale of All Stock of Dorothy Darrow, a Promissory Note ("Note") and an Escrow Agreement (II R. Doc. #15 at 432-442). Under the default provisions of the Escrow Agreement, in the event the Note was not

of resignation (IV R. Doc. #17 at 1099), and the Notice of Default (*Id.* at 1097), are relevant as to whether or not Granzow, Sherman and Tormey had only paper title after February 6, 1976. Contrary to PBGC's assertion, the record does indeed reflect that Hawkins and Nick continued as directors, subject to the direction of Mr. Darrow and Mr. Schaeffer, after Februray 6, 1976 (*Id.* at 1032). Finally, the record indicates that Mrs. Darrow would not consent to the execution of a security agreement necessary to obtain bank financing in order to keep East Dayton solvent (Doc. #38, Granzow Aff. at 15).

This Court notes that the outcome in this case would remain unaltered even if this Court were to conclude that the Magistrate did indeed make independent factual findings. All parties herein concede that § 706(2)(A) is the proper legal standard of review to be applied in scrutinizing the agency findings of fact under the circumstances of this case. Under the § 706(2)(A) standard, "a reviewing court must conduct a 'searching and careful' inquiry into the record in order to assure itself that the agency has examined the relevant data and articulated a reasoned explanation for its actions including a 'rational connection between the facts found and the choice made.'" *Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Comm'n.*, 734 F.2d 1486 (6th Cir.), *cert. denied, Williams Pipe Line Co. v. Farmers Union Cent. Exchange, Inc.*, 469 U.S. 1034 (1984) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). An agency's decision is arbitrary and capricious if the agency entirely fails to consider the proper law. *Labor Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (courts must set aside administrative decisions which rest on an 'erroneous legal foundation'). This Court concludes

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paid, the parties agreed that all rights of ownership would revert to the Escrow Agent and Dorothy Darrow. She could then either cause liquidation or the immediate election of no less than two persons to the company's board of directors (IV R. Doc. #17 at 1088 ¶¶ 2, 3).

that its earlier finding, that the Appeals Board decision was not in accordance with law, would likewise suffice to demonstrate that the Board's findings and conclusions in this case were arbitrary and capricious, since the Board would be unable to provide a reasoned justification for a decision resting on an erroneous legal foundation. Once the wrong law is applied to the facts in a particular action, the correct result cannot be reached.

In accordance with the foregoing analysis, this Court finds that the Appeals Board decision applied the wrong test for determining control and therefore reached an arbitrary and capricious result.

This Court, accordingly ORDERS that:

(1) Defendants' motion to dismiss as to Granzow, Sherman and Tormey (Doc. #6) be sustained;

(2) Defendants' motion for judgment on the pleadings as to East Dayton, Roscommon Realty, Roscommon Financial, Dayton Casting, and Advance (Doc. #7) be sustained;

(3) Plaintiff's motion for protective order (Doc. #22) is moot;

(4) Defendants' motion to compel discovery (Doc. #26) is moot.

Judgment will be entered in favor of the Defendants and against the Plaintiff herein.

The captioned cause is hereby terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

December 23, 1992

/s/ Walter Herbert Rice
WALTER HERBERT RICE
United States District Judge

[Filed Feb. 20, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Civil Action No. C-3-82-228

Judge Rice
Magistrate Mertz

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff,

-vs-

THE EAST DAYTON TOOL & DIE
COMPANY, INC., *et al.*,
Defendants.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

Plaintiff Pension Benefit Guaranty Corporation, the PBGC, brought this action to enforce a final determination assessing liability against the Defendants relating to termination of the retirement plan of East Dayton. On July 5, 1985, the Magistrate entered a Report and Recommendations (Doc. #39) recommending that the Motion to Dismiss of Defendant Granzow, Sherman, and Tormey, and the Motion for Judgment on the Pleadings of the other Defendants be granted. The PBGC objected and on January 11, 1988, the case was recommitted to the Magistrate for consideration of the Objections.

The Objections do not require modification of the proposed findings of fact set forth in the original Report, and they are incorporated herein by reference.

In the original Report, the Magistrate found that *In re Challenge Stamping and Porcelain Co.*, 719 F. 2d 146 (6th Cir. 1983), was applicable to this case for reasons which are set forth at length in the original report. Plaintiff argues that *Dickens* is clearly distinguishable in that it is applicable only when control of a corporation is lost in the bankruptcy context and suggests that *PBGC v. Obiemet Corp.*, 711 F. 2d 1085 (1st Cir. 1983), *cert. denied* 450 U.S. 914 (1983), should control. The Magistrate disagrees. *Obiemet* is not controlling in this Circuit and other courts in the Circuit have continued to hold that withdrawal liability will only be imposed upon the entity in *actual* control upon termination. *Teamsters Pension Trust Fund v. Central Michigan Trucking, Inc.*, 859 F. 2d 1107 (6th Cir. 1988) (quoting *Dickens*); *Central Transportation Inc. v. Central States Area Pension*, 640 F. Supp. 56, 60 (E.D. Tenn. 1986); *Central States Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 12 (W.D. Mich. 1987).

Plaintiff also objects to the standard of review employed in the original Report, arguing that the Magistrate exceeded the bounds of 5 U.S.C. § 706(2) by making findings of fact and substituting his own conclusions for that of the Appeals Board. The objection is not well taken. 5 U.S.C. § 706 provides that a reviewing court shall examine the entire record or those parts of it cited by a party. This includes all the evidence submitted by both parties. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 464, 489 (1951). Under § 706, the Court may set aside agency findings and conclusions it finds to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. The scope of review under this section is limited only by statutory preclusion and a congressional grant of agency discretion. § 701a(1)(2).

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory

> mandate or that frustrate the congressional policy underlying a statute.

N.L.R.B. v. Brown, 380 U.S. 278, 292 (1965).

The controlling issue in this case is what entity was in *actual* control when the pension plan was terminated. In 1973, a sale of all the stock of East Dayton was negotiated between the controlling shareholder, Dorothy Darrow, and the individual Defendants. Pursuant to the sale, an escrow agreement was executed to evidence the payment procedure and liability on the promissory note (Admin. Record 1095). The escrow agreement provided the buyers all ownership rights except possession and transfer as long as there was no default on the note. In January, 1976, it became apparent that East Dayton would require more financing if it were to survive the recession. Financing could not be obtained without Mrs. Darrow's executing a security agreement on the equipment and machinery (Doc. #38, Granzow Aff., p. 15). Mrs. Darrow refused consent, East Dayton defaulted on the note, and the escrow agreement was thereby breached. On February 6, 1976, pursuant to the escrow agreement, the East Dayton shareholders formally transferred control of East Dayton to Mrs. Darrow (*Id.* at p. 16). From that date forward, all effective control of East Dayton was in the hands of Herman Darrow as Dorothy Darrow's representative (Doc. #38, Hawkins Aff. at p. 19). The East Dayton pension plan was terminated pursuant to an agreement with the PBGC effective May 15, 1976. *Id.* Regardless of which entity held legal title to the East Dayton stock, the entity in actual control of East Dayton at the termination of the plan was East Dayton itself. By withholding her consent to additional financing, Mrs. Darrow denied the buyers the right to participate in the sale and liquidation of East Dayton and thus any control at the time of termination of the plan.

The PBGC claims its decision assessing liability was not arbitrary, capricious, or an abuse of discretion and

should not therefore be overturned. Having decided that the only party in control at the time of termination was East Dayton, the Court will discuss the deficiencies in the procedure the PBGC afforded Defendants.

The PBGC argues its decision was based entirely on uncontested facts shown by documentary evidence in the Administrative Record and that no oral hearing was required in that the procedure was analogous to a summary judgment motion (Doc. #47). In Defendants' initial motion, they indicated they had requested and been denied an oral hearing to present witnesses and cross-examine the agency's witnesses. In addition, they had been denied discovery and had only been permitted to obtain documents from the agency under the Freedom of Information Act. The PBGC responds that these procedural niceties were unnecessary in that there were no questions of material fact present in the case.

The PBGC's position is based on its conclusion that the control group definition it applied is clearly applicable. If it were correct on that point, it would appear that the facts regarding actual control raised by Defendants would not be material. Since the Magistrate is of the opinion that the agency's definition is not the correct law, in light of *Dickens, supra,* this Court has the authority to set aside the agency's findings and conclusions. *N.L.R.B. v. Hearst Publications,* 322 U.S. 111, 131 (1943).

The Magistrate accordingly continues to adhere to the initial recommendations made in the Report of July 5, 1985.

February 20, 1990.

/s/ Michael R. Merz
MICHAEL R. MERZ
United States Magistrate

[Filed Mar. 9, 1994]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 93-3185

PENSION BENEFIT GUARANTY CORPORATION,
Plaintiff-Appellant,
v.

THE EAST DAYTON TOOL &
DIE CO., INC., *et al.*,
Defendants-Appellees.

ORDER

BEFORE: KEITH and NORRIS, Circuit Judges; and ZATKOFF,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

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* Hon. Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

STATUTORY PROVISIONS

§ 1301. Definitions

(a) For purposes of this subchapter, the term—

(1) "administrator" means the person or persons described in paragraph (16) of section 1002 of this title;

(2) "substantial employer" means for any plan year an employer (treating employers who are members of the same affiliated group, within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(a)(4) and (e)(3)(C) of Title 26, as one employer) who has made contributions to or under a plan under which more than one employer (other than a multiemployer plan) makes contributions for each of—

(A) the two immediately preceding plan years, or

(B) the second and third preceding plan years,

equaling or exceeding 10 percent of all employer contributions paid to or under that plan for each such year;

(3) "multiemployer plan" means a plan—

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation,

except that, in applying this paragraph—

(i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and

(ii) for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in section 414(f) of Title 26 as in effect immediately before such date;

(4) "corporation", except where the context clearly requires otherwise, means the Pension Benefit Guaranty Corporation established under section 1302 of this title;

(5) "fund" means the appropriate fund established under section 1305 of this title;

(6) "basic benefits" means benefits guaranteed under section 1322 of this title (other than under section 1322(c) of this title), or under section 1322a of this title (other than under section 1322a(g) of this title);

(7) "non-basic benefits" means benefits guaranteed under section 1322(c) of this title or 1322a(g) of this title;

(8) "nonforfeitable benefit" means, with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or sus-

pended by a plan amendment, an occurrence of any condition, or operation of this chapter or Title 26;

(9) "reorganization index" means the amount determined under section 1421(b) of this title;

(10) "plan sponsor" means, with respect to a multiemployer plan—

(A) the plan's joint board of trustees, or

(B) if the plan has no joint board of trustees, the plan administrator;

(11) "contribution base unit" means a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, as defined in regulations prescribed by the Secretary of the Treasury; and

(12) "outstanding claim for withdrawal liability" means a plan's claim for the unpaid balance of the liability determined under part 1 of subtitle E of this subchapter for which demand has been made, valued in accordance with regulations prescribed by the corporation.

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26.

(2) For purposes of this subchapter, "single-employer plan" means, except as otherwise specifically provided in this subchapter, any plan which is not a multiemployer plan.

(3) For purposes of this subchapter, except as otherwise provided in this subchapter, contributions or other payments shall be considered made under a plan for a plan year if they are made within the period prescribed under section 412(c)(10) of Title 26.

(4) For purposes of subtitle E of this subchapter, "Secretary of the Treasury" means the Secretary of the Treasury or such Secretary's delegate.

(Pub.L. 93-406, Title IV, § 4001, Sept. 2, 1974, 88 Stat. 1003; Pub.L. 96-364, Title IV, § 402(a)(1), Sept. 26, 1980, 94 Stat. 1296.)

§ 1361. Amounts payable by corporation

The corporation shall pay benefits under a single-employer plan terminated under this subchapter subject to the limitations and requirements of subtitle B of this subchapter. The corporation shall provide financial assistance to pay benefits under a multiemployer plan which is insolvent under section 1426 or 1441(d)(2)(A) of this title, subject to the limitations and requirements of subtitles B, C, and E of this subchapter. Amounts guaranteed by the corporation under sections 1322 and 1322a of this title shall be paid by the corporation only out of the appropriate fund. The corporation shall make payments under the supplemental program to reimburse multiemployer plans for uncollectible withdrawal liability only out of the fund established under section 1305(e) of this title.

(Pub.L. 93-406, Title IV, § 4061, Sept. 2, 1974, 88 Stat. 1029; Pub.L. 96-364, Title IV, § 403(f), Sept. 26, 1980, 94 Stat. 1301.)

§ 1362. Liability of employer

(a) Employers covered

This section applies to any employer who maintained a single-employer plan at the time it was terminated, but does not apply—

(1) to an employer who maintained a plan with respect to which he paid the annual premium described in section 1306(a)(2)(B) of this title for each of the 5 plan years immediately preceding the plan year during which the plan terminated unless the conditions imposed by the corporation on the payment of coverage under section 1323 of this title do not permit such coverage to apply under the circumstances, or

(2) to the extent of any liability arising out of the insolvency of an insurance company with respect to an insurance contract.

(a) Amount of liability

Any employer to which this section applies shall be liable to the corporation, in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

(c) Net worth of employer

For purposes of subsection (b)(2) of this section the net worth of an employer is—

(1) determined on whatever basis best reflects, in the termination of the corporation, the current status of the employer's operations and prospects at the time chosen for determining the net worth of the employer, and

(2) increased by the amount of any transfers of assets made by the employer determined by the corporation to be improper under the circumstances, including any such transfers which would be inappropriate under Title 11 if the employer were a debtor in a case under chapter 7 of such title.

(d) Corporate reorganizations

For purposes of this section the following rules apply in the case of certain corporate reorganizations:

(1) If an employer ceases to exist by reason of a reorganization which involves a mere change in identity, form, or place of organization, however, effected, a successor corporation resulting from such reorganization shall be treated as the employer to whom this section applies.

(2) If an employer ceases to exist by reason of a liquidation into a parent corporation, the parent corporation shall be treated as the employer to whom this section applies.

(3) If an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to whom this section applies.

(e) Cessation of operations at one facility

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 1363, 1364, and 1365 of this title shall apply.

(Pub.L. 93-406, Title IV, § 4062, Sept. 2, 1974, 88 Stat. 1029; Pub.L. 95-598, Title III, § 321(b), Nov. 6, 1978, 92 Stat. 2678; Pub.L. 96-364, Title IV, § 403(g), Sept. 26, 1980, 94 Stat. 1301.)